LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 3 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 837

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, *Petitioners*,

v.

EDWARD MEARS, Individually and Trading as Mears Coal Company.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

VAL J. MITCH,
HAROLD H. BACON,
CHARLES L. WIDMAN,
907 Fifteenth Street, N. W.,
Washington, D. C.

A. E. KOUNTZ,
ALEXANDER UNKOVIC,
WILLIAM G. BOYLE,
KOUNTZ, FRY & MEYER,
1424 Frick Building,
Pittsburgh 19, Pennsylvania.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.
Attorneys for Petitioners.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

Subject Index

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	3
BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT	3
QUESTION PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
A. The District Court Proceedings, Opinion and Judgment	4
B. The Third Circuit's Opinion and Judgment	8
C. Trustees' Petition for Rehearing Was Denied By an Equally Divided Third Circuit; Four Judges Dissented and Filed a Dissenting Opinion	8
REASONS FOR GRANTING THE WRIT	11
I.	11
II.	12
III.	12
IV.	15
CONCLUSION	23

TABLE OF CASES

	Page
Alcoa S. S. Co., Inc. v. *U.S.*, 338 U. S. 421, 423	14
Burke v. *Dulaney*, 153 U. S. 228 (1894)	21
Cox v. *Gatliff Coal Co.*, DC, E.D., Ky., 1945, 59 F. Supp. 882, 886	12, 17
Drake Bakeries, Inc. v. *Local 50, America Bakery etc.*, 2 Cir., 294 F. 2d 399, cert. granted 7 L. ed 2d 437	14
Eliason v. *Wilborn*, 281 U. S. 457	23
Farmers Nat. Bank & Trust Co. v. *Flexible Truck Corp.*, 3 Cir., 81 F. 2d 541	23
Gambrell v. *Lewis*, 167 A. 2d 605 (Mun. Ct. of App., D.C., 1961)	6
Gatliff Coal Co. v. *Cox*, 6 Cir., 152 F. 2d 52, 56	11, 12, 16, 18, 19
H. J. Heinz Co. v. *NLRB*, 311 U. S. 514, 523-4, 525	12, 16, 17
International Brotherhood of Teamsters, Local 695, A.F.L. v. *Vogt, Inc.*, 354 U. S. 284, 287	14
Lewis v. *Benedict Coal Corp.*, 361 U. S. 459, 465, 466, 468, 469, 470	9, 10, 12, 17, 20, 21, 22
Lewis v. *Lowry*, 4 Cir., 295 F. 2d 197, cert. den. 7 L. ed 2d 438	9, 10, 11-12, 13
Lewis v. *Mearns*, DC, N.D., W. Va., 1958, 168 F. Supp. 134, 138	11, 19
Lewis v. *Mears*, DC, W.D., Pa., 189 F. Supp. 503	2
Lewis v. *Mears*, 3 Cir., 297 F. 2d 101	2
Lewis v. *Toth*, DC, W.D., Pa., 1959 (unreported)	11, 18
Lewis v. *Toth*, 3 Cir., 280 F. 2d 422	11, 18
Local 174, Teamsters v. *Lucas Flour Co.*, 7 L. ed 2d 593, 598 (1962)	17, 21
Local 761, Int. Union, etc. Workers v. *NLRB*, 366 U. S. 637, 671	14
Mearns v. *Lewis*, 4 Cir., 268 F. 2d 427, 428	11, 18
NLRB v. *Industrial Cotton Mills*, 4 Cir., 208 F. 2d 87, 91	23
Similow v. *Dickerson*, 357 Pa. 455, 54 A. 2d 883 (1947)	21
Textile Workers Union v. *Lincoln Mills*, 353 U. S. 448	17
U. S. v. *Carter*, 353 U. S. 210, 220	23
United States v. *Standard Oil Co.*, 332 U. S. 301, 302 (fn. 2)	14
United Steelworkers of America v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578	17

STATUTES

	Page
28 USCA	3
Section 1254(1)	3
Section 2101(c)	3
Labor Management Relations Act, 1947 (Taft-Hartley Act):	
Section 8(d) [29 USCA 158(d)]	3, 4, 9, 10, 11, 12, 15, 16, 17, 19
Section 302(e)(5)(B) [29 USCA 186(c)(5)(B)]	3, 4, 9, 10, 12, 15, 16, 19

INDEX TO APPENDIX IN BRIEF

	Page
APPENDIX A	
Opinion, October 11, 1961, United States Court of Appeals for the Third Circuit, Lewis et al v. Edward Mears, etc.	1a
Judgment, October 11, 1961, United States Court of Appeals for the Third Circuit, Lewis et al v. Edward Mears, etc.	6a
APPENDIX B	
Opinion Sur Petition for Rehearing, January 4, 1962, United States Court of Appeals for the Third Circuit, Lewis et al v. Edward Mears, etc.	7a
Dissenting Opinion of Chief Judge Biggs, January 4, 1962, Lewis et al v. Edward Mears, etc.	7a
Order Sur Petition for Rehearing, January 4, 1962, United States Court of Appeals for the Third Circuit, Lewis et al v. Edward Mears, etc.	8a
APPENDIX C	
Labor Management Relations Act, 1947:	8a
Section 8(d) [29 USCA 158(d)]	8a
Section 302 [29 USCA 186]	
APPENDIX D	
Opinion, September 16, 1961, United States Court of Appeals for the Fourth Circuit, Lewis et al v. F. Arnold Lowry, etc.	10a

Dissenting Opinion of Chief Judge Sobeloff, September 16, 1961, Lewis et al v. F. Arnold Lowry, etc. 14a

APPENDIX E

Transcript of Oral Opinion, October 30, 1959, United States District Court for the Western District of Pennsylvania, Lewis et al v. Edward J. Toth, etc. 21a

Opinion, July 2, 1960, United States Court of Appeals for the Third Circuit, Lewis et al v. Edward J. Toth, etc. 25a

APPENDIX F

List of pending cases in federal district courts, instituted by Trustees of UMWA Welfare and Retirement Fund against various defendant coal companies 26a

APPENDIX G

Petition for Rehearing filed by Trustees of UMWA Welfare and Retirement Fund in the United States Court of Appeals for the Third Circuit, Lewis et al v. Edward Mears, etc. 32a

IN THE

Supreme Court of the United States

October Term, 1961

No.....

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, *Petitioners*,

v.

EDWARD MEARS, Individually and Trading as Mears Coal Company.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit[2] entered October 11, 1961 (A. 6a), in Case No. 13,502, styled John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of Amer-

[1] Herein called "Fund". "Petitioners" are also called "Trustees" herein.

[2] The United States Court of Appeals for the Third Circuit is herein called either the "Third Circuit" or "Court of Appeals".

ica Welfare and Retirement Fund of 1950, Appellants, v. Edward Mears, Individually and Trading as Mears Coal Company, Appellee,[3] wherein the Third Circuit affirmed the judgment entered by the United States District Court for the Western District of Pennsylvania,[4] "in favor of the defendant . . . and against plaintiffs" (J.A. 13a[5]), as well as the order (A. 8a) entered January 4, 1962, by the Third Circuit based upon its Opinion Sur Petition For Rehearing wherein that court *en banc* (8 Circuit Judges participating) being *equally divided*, noted "There is not a majority of the Court in favor of granting the petition for rehearing", and "Accordingly the petition will be denied", from which Chief Judge Biggs and Circuit Judges Staley, Ganey and Smith dissented (A. 7a).

A certified Appendix record in said case, together with the proceedings in the Third Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINIONS BELOW

The District Court's opinion appears in the certified Appendix record (J.A. 17a-30a) and is reported in 189 F. Supp. 503. The Third Circuit's opinion appears in Appendix A hereto at page 1a, *et seq.* The Third Circuit's Opinion Sur Petition for Rehearing and the dissenting opinion of Chief Judge Biggs, joined in by Circuit Judges Staley, Ganey and Smith, appears in Appendix B hereto at page 7a, *et seq.* Both appear in the certified Appendix record and are reported in 297 F. 2d 101.

---

[3] Herein called "Mears".

[4] Herein the United States District Court for the Western District of Pennsylvania is called "district court" or "trial court".

[5] The abbreviation "A." refers to the Appendix to the instant petition; while the abbreviation "J.A." refers to the Joint Appendix filed in the Third Circuit.

JURISDICTION

The Third Circuit's judgment affirming the trial court's judgment was entered October 11, 1961 (A. 6a). Its order denying the Petition For Rehearing was entered January 4, 1962 (A. 8a).

This Court's jurisdiction is invoked under 28 USCA. Sections 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for federal jurisdiction in the United States District Court of the complaint was diversity of citizenship between the plaintiffs and the defendant and the amount involved.

QUESTION PRESENTED

In an action by Trustees of an irrevocable trust contained in an industry-wide collective bargaining contract between bituminous coal operators and United Mine Workers of America, in writing in conformity with Section 8(d) of the Labor Management Relations Act, 1947, and which trust was created pursuant to that Act's Section 302(c) for the benefit of all employees of all employer signatories to the agreement, brought to recover unpaid moneys due the trust under said trust provisions against a single operator signatory, (a) does national labor policy as set forth in said statutes preclude proof by a signatory that there was an oral secret agreement between himself and a union representative, unknown to Trustees, that such written collective bargaining agreement would not be a contract until he received an executed copy thereof; and (b) does such national labor policy foreclose such a defense as against the Trustees so as to require the signatory to pay in accordance with his written agree-

ment, even though such oral secret agreement may be shown?

STATUTES INVOLVED

The pertinent statutory provisions involved are Sections 8(d) and 302(c)(5) of the Labor Management Relations Act, 1947 (called "Act") [29 USCA 158(d) and 186(c)(5)] which are set forth in Appendix C hereto (page 8a, et seq.).

STATEMENT OF THE CASE

A: The District Court Proceedings, Opinion and Judgment

Pursuant to the Act's Section 302(c), the National Bituminous Coal Wage Agreement of 1950 created the "United Mine Workers of America Welfare & Retirement Fund of 1950" as an irrevocable trust for employees of signatory coal operators, their families and dependents (J.A. 123a). By its terms, "each operator signatory" agreed to pay into the Fund 30¢ "on each ton of coal produced for use or for sale" (J.A. 122a), which was increased to 40¢ by an amendment effective October 1, 1952 (J.A. 133a).*

Mears, operating a mine in Pennsylvania, admittedly executed the 1952 Agreement (J.A. 36a). Thereunder, from October 1, 1952 through December 31, 1955, Mears produced 9,074.83 tons of coal for use or for sale (J.A. 36a), obligating Mears to pay the Fund $3,629.93 (J.A. 37a). Instead Mears paid only $234.00 (J.A. 37a). Such payments began July 9, 1952, and continued monthly thereafter through April, 1953 (J.A. 151a), when Mears wrote on the Check Letter of Advice, "Last Order and

* The National Bituminous Coal Wage Agreement of 1950 is called "1950 Agreement" (J.A. 121a); as amended effective February 1, 1951, it is called the "1951 Agreement" (J.A. 130a); and as amended effective October 1, 1952, it is called the "1952 Agreement" (J.A. 132a).

Shut Down by Inspector" (J.A. 63a, 152a). Mears actually resumed mining operations several months later (J.A. 51a-53a), but never notified the Fund thereof, nor did he resume remittances to the Fund.

Trustees instituted in the District Court the instant action to recover a money judgment for $3,395.93 (A. 10a, 37a) against defendant arising upon his said obligation. Denying liability, Mears claimed the Agreement "was to have been executed by" United Mine Workers of America[7] and a copy as executed forwarded to him which, as Mears claimed, he did not receive (J.A. 50a), although, in his Answer, Mears had not claimed these were conditions precedent to an existing agreement (J.A. 7a-8a).

In a trial by jury, Mears testified, over Trustees' objections (J.A. 42a-43a, 50a), he was told by UMW representative Anderson, who did no work for the Fund (J.A. 39a) and has "nothing to do at all with" it (J.A. 105a), that "the contract wouldn't be a contract until he had gotten a copy of it back signed and completely executed" (J.A. 50a). Anderson related that when Mears executed these several agreements he had Mears sign three copies of each thereof, which was customary practice, as was sending the agreements to the District and National offices for Union representatives' signatures (J.A. 102a-103a), but Anderson categorically denied Mears' statement that he told Mears he would not be bound by the contract until Mears got a copy, declaring, "I couldn't tell him that" (J.A. 102a). While Anderson's further testimony is that three copies are required so that UMW, the District and the signatory operator would each get a copy (J.A. 42a) and that he might have told Mears "He'd get one" (J.A. 42a, 104a-105a) since that was Anderson's

---

[7] Herein called "UMW".

practice (J.A. 42a); actually when Mears executed the contracts he and Mears did not discuss the point (J.A. 42a). Union signatories had not signed the agreements when Mears executed them (J.A. 102a-103a), but, as Anderson related and as the record shows, they were subsequently signed (J.A. 130a, 132a, 135a). Mears admits he never asked for a copy of the agreement (J. A. 66a).

Not only did Mears admit executing the Agreement and transmitting monthly payments to the Fund, Mears admitted owing the Fund $66.00 and when the Fund asked for payment thereof, Mears wrote "I was unable to pay" (J.A. 85a); and though Fund's counsel wrote Mears concerning his delinquency, there is no record indicant that Mears disputed his obligation or made any assertion that the indebtedness was not under his covenant contained in the 1952 Agreement. Moreover, Mears held a hospital card issued by the Fund, which he used on sixteen occasions subsequent to October 1, 1952, and as a result thereof the Fund expended $943.14 for hospital and medical expenses on behalf of Mears; and while Mears contended he held a hospital card because he joined UMW in 1950, the expenditures by the Fund on Mears' behalf were all subsequent to the time when Mears admitted he executed the agreements (J.A. 66-9a). Further, though the district court emphasized (J.A. 24a) that Mears was a union member, it ignored the legal aspects that "union membership is not the controlling test or the criterion of eligibility to participate in the Fund" and that benefits were available only where work performed is at a mine operated by a signatory operator. [*Gambrell* v. *Lewis*, 167 A.2d 605, (Municipal Court of Appeals, D.C. 1961)].

In its jury charge, the trial court submitted to the jury an interrogatory as to whether Anderson agreed with

Mears at the time of the agreement's execution the agreement "would not become valid and enforceable" until Mears received copies thereof executed by UMW, to which interrogatory the jury gave an affirmative answer (J.A. 12a, 120a).[*] At the close of the evidence and in Trustees' requests for points for charge (J.A. 10a), Trustees sought a directed verdict but the court reserved decision thereon (J.A. 108a).[†] Following the trial by jury, the district court denied Trustees' directed verdict motion upon which it had reserved decision and ordered "judgment be entered, in accordance with the jury's answers to the interrogatories submitted to it by the court, in favor of" Mears and against Trustees (J.A. 13a).

Thereafter, Trustees, by motion, moved that the verdict and judgment be set aside and Trustees be granted a new trial (J.A. 15a), but the district court, in a written opinion and order (J.A. 17a-30a), denied such motion. As to the question presented (ante, p. 3), the district court declared that, "the parol evidence has no application to the facts of this case" (J.A. 20a); that "the federal courts in fashioning 'a body of federal law in the light of the national labor policy' have simply adopted and applied the common law parol evidence rule, and that rule, as previously demonstrated has no application to the facts in this case" and that "There was no attempt to alter, vary, or contradict any term of the alleged contract in the instant suit; the defendant was simply permitted to show that no contract existed, which as we have

---

[*] A second interrogatory submitted to the jury was,

"Did the defendant Mears on April 5, 1953 enclose a note with the check letter of advice which he sent to plaintiffs stating in said note that he cancelled the contract with the Union?" (App. 12a, 115a), which the jury answered in the negative (J.A. 12a, 120a).

[†] The court had already denied Trustees' motion for directed verdict at the conclusion of Mears' testimony (J.A. 81a, 89a-90a).

seen, was not in violation of the parol evidence rule" (J.A. 22a-23a). The district court then concluded that it "was not in error in permitting the defendant to prove the agreed condition precedent to the formation of the contract in suit" (J.A. 23a).

B. The Third Circuit's Opinion and Judgment.

Upon Trustees' appeal, the Third Circuit (per Circuit Judges Goodrich, McLaughlin and Kalodner), by its October 11, 1961 order (A. 6a), affirmed the district court's judgment in defendant's favor. Though the Third Circuit's opinion points to the undisputed fact that Mears forwarded some monthly payments to the Fund and, by Mears' own statement, he could not have sold his coal "unless he paid the royalties" (A. 4a), it opined that the "challenged testimony was introduced to prove that the alleged contract never existed" and it rejected Trustees' contention that national labor policy precluded the admission of Mears' testimony concerning his alleged oral agreement with Anderson on the ground that "national labor policy does not require the exclusion of parol evidence which shows the lack of an effective acceptance of an offer" (A. 5a).

C. Trustees' Petition for Rehearing Was Denied By an Equally Divided Third Circuit; Four Judges Dissented and Filed a Dissenting Opinion.

Trustees filed a Petition for Rehearing (A. 32a) pointing out, *inter alia*, that the Third Circuit had overlooked the vital factor that the effect of the Court's action places the burden of alleged secret oral agreements between a union and the employer asserting such agreements *upon employees*—the Fund's ultimate beneficiaries—innocent of wrongdoing and who produced the coal from which stemmed the obligation to pay the royalty upon produc-

tion as this Court had proclaimed in *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 466.

In their rehearing petition, Trustees emphasized that the court's application of its rule that "parol evidence is admissible to prove that a contract did not exist" to labor agreements, and particularly to those containing welfare fund provisions, must be appraised in the light of the Act's Section 302(c)(5)(B) and Section 8(d),[10] about which the Third Circuit's opinion was totally silent; that the congressional requirement in the first of said sections that the detailed basis of welfare fund benefits be "specified in a written agreement with the employer" evidenced congressional contemplation that executed collective bargaining agreements should contain the total agreement between the parties and excluded and foreclosed evidence of any alleged contrary secret oral agreement.

Trustees, in the petition, pointed to the dissenting opinion of Chief Judge Sobeloff in *Lewis* v. *Lowry*, 4 Cir., 295 F. 2d 197, cert. denied, 7 L. ed. 2d 438, challenging, because of national labor policy, the majority view that a secret agreement, about which Trustees had no knowledge, could constitute a defense to a suit by Trustees to collect delinquent royalties. Trustees directed the Third Circuit's attention that the thesis of Chief Judge Sobeloff's dissent was that "the statute authorizing agreements to establish industrial trust funds . . . shall be in writing"; that "broadly as a matter of federal labor law, the so-called 'sham' exception to the parol evidence rule should not be allowed in suits under collective bargaining agreements" and "even if a private oral agreement, said to be the 'real contract', could be relied upon

[10] 29 U.S.C.A. 186(c)(5)(B) and 158(d).

by" the employer "in a suit by the union, it cannot be asserted as against the Trustees" (A. 15a-16a).

The Third Circuit, Per Curiam, by order on January 4, 1962, denied the rehearing petition, noting, "There is not a majority of the Court in favor of granting" it, but Chief Judge Biggs and Circuit Judges Staley, Ganey and Smith dissented. The dissenting opinion of Chief Judge Biggs (A. 7a-8a), in which the other dissenting jurists joined, expressed the view that both the Third Circuit and the trial court erred in their holdings and declared preference for the views found in Judge Sobeloff's dissent, noting the saliency of Taft-Hartley's provisions adverted to above, and stating:

> "As Chief Judge Sobeloff points out in his dissenting opinion in Lewis, Trustee, et al. v. Lowry, 295 F. 2d 197 (4 Cir. 1961), the position taken by the majority emasculates the policy intended to be created by Congress in enacting Section 302(c)(5)(B) and vitiates the spirit of Section 8(d) of the Labor Management Relations Act, 29 U.S.C.A. § 186(c)(5)(B) (Supp. 1960) and § 158(d). The federal courts in fashioning a body of federal common law for the enforcement of collective bargaining agreements, Lewis v. Benedict Coal Corp., *supra*, p. 470, must shape that law so that such agreements cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union. If it be otherwise industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed." (A. 7a-8a).

The Fourth Circuit's opinion and the dissent of Chief Judge Sobeloff, in *Lewis v. Lowry*, decided September 16, 1961, are printed herein as Appendix D, pp. 10a-20a.

REASONS FOR GRANTING THE WRIT

I.

Prior to the instant case, and in conflict with the Third Circuit's holding herein, that Court, in *Lewis* v. *Toth*, 3 Cir., 280 F. 2d 422, had affirmed a district court pronouncement that the Act's Section 8(d) precluded parties to collective bargaining agreements from relying on prior or contemporaneous oral agreements, relying upon *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F. 2d 52. See *Lewis* v. *Toth*, DC, W. D., Pa., 1959 (unreported).[1] This inconsonancy, coupled with the equal division among the Judges of the Third Circuit, as mirrored by the dissent of Chief Judge Biggs and Circuit Judges Staley, Ganey and Smith, in the denial of the rehearing petition herein, shows the state of confusion and uncertainty of what the rule is in the Third Circuit on the question presented. Only by this Court's determination of the question presented may the 27 federal district court jurists in the Third Circuit, covering the industrial states of New Jersey, Pennsylvania and Delaware, know the appropriate judicial guide of this matter.

Similar confusion and uncertainty are current in the Fourth Circuit as a result of that Court's approval in *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, of a district court's holding (*Lewis* v. *Mearns*, DC, N.D. W.Va., 1958, 168 F. Supp. 134), that "the written agreement here was the final step in a collective bargaining process, under Section 8(d) of the . . . Act" and that "It has been held that parties to such contracts are *precluded by the Taft-Hartley Act* from relying upon prior contemporaneous oral agreements"[2] and the Fourth Circuit's subsequent deviation therefrom in *Lewis* v. *Lowry*, 4 Cir., 295 F. 2d

---

[1] The district court's opinion (unreported), and the Third Circuit's affirmance are printed as Appendix E herein, pp. 21a-25a.

[2] All emphases herein are supplied, unless otherwise indicated.

197, cert. denied, 7 L. ed. 2d 438, in which, as already noted, Chief Judge Sobeloff filed a dissent.

II.

The Third Circuit has decided a federal question, important in the processing of collective bargaining agreements and in the Act's administration, as it concerns both industry-wide bargaining agreements and irrevocable industrial trusts for employees, in such a manner as to frustrate rather than promote industrial stabilization through collective bargaining agreements. The Third Circuit's opinion is in conflict with the purposes, spirit and language of Congress in enacting the Act's Section 302(c)(5) and Section 8(d), and it is at variance with the national labor policy expressed therein and by this Court in *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514, and in *Lewis* v. *Benedict Coal Corp*, 361 U. S. 459, and by the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F. 2d 52, affirming *Cox* v. *Gatliff Coal Co.*, DC, E.D., Ky., 1945, 59 F. Supp. 882.

III.

Clearly, the question presented is of importance in the administration of the Act as it related both to the processing of bargaining agreements and industrial trust funds, since the irrevocable trust for which Trustees seek to recover the royalties is one created pursuant to the Act's Section 302(c) and is contained in an industry-wide collective bargaining agreement.

The admonition of Chief Judge Sobeloff in his dissent in *Lowry* that *"this is not just a small case involving a few miners"* and *"If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry wide"* (A. 15a), is more meaningful in the instant *Mears* case, *wherein there is a*

final judgment, than it was in *Lowry*, wherein the case, originally decided on summary judgment, was remanded for further proceedings and trial. In addition to the 10 cases which Chief Judge Sobeloff listed as showing instances where other operators signatory to the agreement sought "to renege on their agreed-upon obligations" (A. 15a), there are currently pending in federal district courts of West Virginia, of Kentucky and of Tennessee, 38 cases wherein employers, as contract signatories, have asserted defenses against Trustees' (Petitioners) claims for delinquent royalties which employ, as a basis for such defenses, an alleged secret oral agreement or conditions or stipulations, unknown to the Trustees, which changed the written obligation of the signatory operator and, as Judge Sobeloff points out in his dissent, allows "the trust fund to be eroded" (A. 19a). These 38 cases, together with those in the instant *Mears* case and the *Lowry* case, aggregate in excess of One Million Dollars ($1,000,000.00).*

* The pending cases are as follows:

Name of Company	*Amount Claimed*
George A. Bryant & Sons Coal Co.	$ 19,946.01
E. Dick Burrow Coal Co.	23,560.00
Willis Flynn Coal Co.	21,350.48
Howard Higgins Coal Co.	12,452.15
R. B. Ivey Coal Co.	23,082.22
Will Land Coal Co. and/or Will Land & Sons Coal Co.	12,302.90
Charlie Martin Coal Co.	33,526.03
Patrick & Hampton Coal Co.	22,457.30
Earl Patton Coal Co.	41,741.34
Hampton E. Patton Coal Co.	18,442.61
James Patton Coal Co.	36,564.30
J. W. Sanders Coal Co. and J. W. Sanders & Sons Coal Co.	6,124.48
J. A. Cordell Coal Co. and/or Cordell Coal & Constr. Co.	11,170.72
H. A. Daffron Coal Co.	13,692.71
M. T. Dixon Coal Co.	16,345.40
J. H. Graham Coal Co.	12,948.80
M. & T. Coal Co.	35,898.15
Marshall Meeks Coal Co.	46,113.36
W. T. Morrison Coal Co.	21,494.40
Hershel Myers Coal Co.	15,170.12
Waldo Myers Coal Co.	11,757.30
Edward Nunley Coal Co.	11,782.28

(Footnote No. 14 Continued on Page 14)

Heretofore certiorari was awarded "*because determination of the issue raised here will guide adjustment of a large body of similar claims now pending*" in *Alcoa S. S. Co., Inc.* v. *U. S.*, 338 U. S. 421, 423. More recently, the Court granted certiorari in *Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U. S. 667, 671, because, "*the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification*". The "*recurrence of the question*" caused this Court to grant certiorari in *International Brotherhood of Teamsters, Local 695, A.F.L.* v. *Vogt, Inc.*, 354 U.S. 284, 287. Again, in granting the writ in *United States* v. *Standard Oil Co.*, 332 U. S. 301, 302, "because of the novelty and importance of the principal question", the Court noted that "*The suit also was said to be representative of a number already commenced*" (p. 302, fn. 2). See also *Drake Bakeries, Inc.* v. *Local 50, America Bakery etc.* 2 Cir., 294 F.2d 399, wherein the Second Circuit divided equally sitting *en banc* on rehearing of a three-judge panel decision, and this Court granted certiorari. 7 L. ed. 2d 437.

(Footnote No. 14 Continued from Page 13)

Leon Nunley Coal Co.	10,069.03
Aaron Presnell Coal Co.	17,012.90
F. W. Pryor Coal Co.	22,557.91
Ramsey Coal Co. and G. & E. Ramsey Coal Co.	21,210.40
Horace J. Scissom Coal Co.	37,567.96
Stephenson & Stephenson Coal Co.	23,790.93
J. H. Goforth Coal Co.	23,171.25
Dewey Trussell Coal Co.	15,436.00
Rainbow Coal Corp.	23,345.60
Days Branch Coal Co.	13,143.25
Tenneco, Inc.	129,724.40
Paul Gibbs Coal Co.	38,476.80
American Pocahontas Coal Co.	23,660.42
Robin Red Ash Coal Co.	24,337.25
H. R. Gifford Coal	51,748.60
Witten Mining Co.	11,458.57
Total	$ 954,634.33
In addition:	
Lowry Coal Co.	49,531.40
Mears Coal Co.	3,395.93
Total	$ 1,007,561.66

A detailed description of the foregoing cases is to be found in Appendix F hereto (A. 26a).

These cases have applicability and pertinency to the instant petition. Necessarily, the uncertainty, confusion and conflict already emphasized by Trustees herein will continue to exist until this Court, upon review by certiorari, supplies the requisite juridical guides so that lower federal courts may with definitiveness advise litigants of the true apposite rules. Indeed, under the circumstances, a crucial inquiry is, what rule are the various district courts to follow? The need for proper judicial guides for utilization in the trials of the pending litigation is an impelling reason for this Court's granting the review herein sought.

Actually, the impact of the Third Circuit's holding will be even more expansive than is suggested by the foregoing collation of cases, for *Mears'* pattern of avoiding his written obligation, upon which the Third Circuit has placed its sanction, may well become the device and weapon for use by employers in all other industries to destroy employee confidence in the processes of collective bargaining and thereby to thwart congressionally-expressed national labor policy of eradicating industrial strife through the medium of written collective bargaining agreements. The rule of law which the Third Circuit endorses herein, which renders instable and uncertain bargaining contracts, is antithetical to the spirit, the purpose and the language of the Act's Sections 302(c)(5) and 8(d). Chief Judge Sobeloff's dissent poses in succinct and apt fashion the impact of the Third Circuit's opinion by his query: "what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?" (A. 19a).

IV.

Since the divergence of views expressed in the dis-

senting opinion of Chief Judge Biggs, in which Circuit Judges Staley, Ganey and Smith joined, from the opinion of Circuit Judge Kalodner herein[1] is based upon the dissenters' belief that the opinion is opposed by national labor policy expressed in Sections 302(c)(5)(B) and 8(d), the following discussion is devoted to demonstrating that the Third Circuit's opinion of October 11, 1961, collides with such policy and is erroneous.

The original National Labor Relations Act (the "Wagner Act") was relatively new when this Court noted its preference for written collective bargaining agreements as "Contrasting with the unilateral statement by the employer of his labor policy" and mandated that agreements reached by bargaining negotiators be reduced to writing "as a permanent memorial" and "an authentic record" of its terms, not only to evidence the employer's good faith but as "the final step in the bargaining process" and because, significantly, "the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife". *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 523-4, 525.

Pointing to *Heinz*, the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F. 2d 52, 56, sanctioned a district court's declarations that national labor policy demanded that collective bargaining agreements be accorded "a more secure and stable position in our National economy than that of ordinary common law contracts which may be altered at pleasure" and that the "National Labor Relations Act clearly precludes defendant's reliance upon the prior or contemporaneous oral agreement upon which

---

[1] The instant case was heard and decided by Judges Goodrich, McLaughlin and Kalodner. Upon petition for rehearing, the petition was denied by Circuit Judges Goodrich, McLaughlin, Kalodner and Hastie.

its defense . . . is based." *Cox* v. *Gatliff Coal Co.*, DC. E. D. Ky., 1945, 59 F.Supp. 882, 886.

Statutory accord with national labor policy as expressed in *Heinz* is found in Congress' enactment of Section 8(d) [29 USCA 158(d)], which requires, as an element of good faith bargaining, "the execution of a written contract incorporating any agreement reached if requested by either party." (A. 8a). On at least four occasions since Congress adopted Section 8(d), this Court has recognized the pertinency of national labor policy in interpreting and implementing collective bargaining agreements. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448; *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459; and *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578; *Local 174, Teamsters* v. *Lucas Flour Co.*, 7 L. ed. 2d 593 (1962).

Indeed, the Third Circuit's assertion that "national labor policy does not require the exclusion of parol evidence which shows the lack of an effective acceptance of an offer" (A. 5a), in relation to labor contracts, is at odds with the teaching of *Lincoln Mills*, *Benedict*, *Warrior* and *Lucas Flour* that the interpretation and implementation of bargaining agreements must be accommodative to national labor policy.

The ineptness of such assertion is made clear when it is considered, as Chief Judge Sobeloff reminds us in his dissent, harmonious with *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 468, that the union, in addition to bargaining for itself, bargained also for employees and the Trustees, and that these interests, as well as the public, are entitled to know from a written agreement what are the contract's real terms. The Third Circuit's unwillingness to accord to collective bargaining agreements the protection of federal labor policy explains its indif-

ference to the dissent of Chief Judge Biggs and the three other Circuit Judges that unless federal courts shape federal law so that collective bargaining agreements "cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union" (A. 8a), "industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed" (A. 8a). This dissent is accordant with that of Chief Judge Sobeloff in *Lowry* that "If such written contracts can be nullified whenever the employer and union come to some other secret oral agreement, the purpose of the contract as an instrument of industrial peace may be frustrated" (A. 18a).

The Third Circuit's holding herein stands in total contrast to its action in *Lewis* v. *Toth*, 3 Cir., 280 F. 2d 422, (A. 25a), when it affirmed the pronouncement of a District Court [*Lewis* v. *Toth*, DC, W.D. Pa., 1959 (A. 23a)] that:

> "the written agreements here were the final step in a collective bargaining process under Section 8(d) of the Taft-Hartley Act, and under that Act the parties to collective bargaining agreements are precluded from relying on prior or contemporaneous oral agreements. It was so held in Gatliff Coal Company vs. Cox, 152 F. 2d 52, Sixth Circuit, 1945."

Thus, not only is there a conflict between the majority opinion and rationale of national labor policy in other cases, herein discussed, but the applicable rule in the Third Circuit itself is beclouded and uncertain.

The Third Circuit's discordance with national labor policy stands in sharp contrast, too, to the concern therefor in 1958 when, in *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d

427, the Fourth Circuit affirmed a district court holding which rejected a coal operator's contention that he signed the same industry-wide agreement herein involved merely as a "formality" and that a union representative had told him he need pay only such royalties as he could. *Lewis* v. *Mearns*, DC, N.D. W.Va., 1958, 168 F. Supp. 134. Chief Judge Biggs' dissent in the case at bar accords with the district court's appraisal in *Mearns* that the oral testimony "At most" shows "only a prior or contemporaneous oral agreement which he is barred from introducing here to vary the terms of the written contract by the parol evidence rule" (168 F. Supp. 138), and continuing,

> "In addition, the written agreement here was the final step in a collective bargaining process, under Section 8(d) of the . . . Act. . . . It has been held that parties to such contracts are precluded by the Taft-Hartley Act from relying upon prior or contemporaneous oral agreements. Gatliff Coal Co. v. Cox, 6 Cir., 152 F.2d 52."

The Fourth Circuit, in a per curiam opinion in *Mearns*, adopted the "District Court's opinion which fully discusses the facts and the law" (268 F. 2d 428).

As already noted Chief Judge Biggs' disagreement with the Third Circuit's opinion herein was rooted in his accord with Chief Judge Sobeloff's argument in his *Lowry* dissent that Section 302(c)(5)(B) and Section 8(d) commanded a result different from that reached by the Third Circuit.

The *Lowry* dissent, regarding the statute as an assurance that employees be knowledgeable as to welfare benefits to which they are entitled, notes Section 302(c)(5)(B) required "the detailed basis on which such payments are to be made" must be "specified in a written

agreement with the employer" (A. 16a, 17a) and appropriately observes such protection is incomplete, unless "the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing" (A. 16a). Since, as that dissent, as well as the dissent of Chief Judge Biggs herein, borrows from *Benedict* (361 U.S. 469), that royalty payments are an indirect method of compensating employees, unless reliance may be had upon the written agreement, employees are, the *Lowry* dissent argues, "deceived if the publicly declared, written agreement may be sapped by a secret compact" (A. 17a). In *Benedict*, this Court speaking of the same national labor contract, observed "this is an industry-wide agreement involving many promisors" (361 U.S. 469), which reflects the merit in the *Lowry* dissent's observation that written delineation of royalty payments is necessary to employers in an industry-wide bargaining situation, to enable them to know (A. 17a) "when someone is paying less" royalty than others. Pertinently, the *Lowry* dissent notes that if one signing a written agreement may be permitted to say, "Yes, we have obediently put it in writing, but we did not mean it", then the scheme of financial aid and security to employees from welfare funds for problems of unemployment, illness, old age and death "could be reduced to chaos by a succession of such defenses" as Mears relies upon herein, "bringing in its train a host of social evils" (A. 17a).

The Third Circuit's willingness that a signatory may be absolved of his written obligation to pay royalties to the Trust Fund by oral proof that the collective bargaining agreement, executed by Mears, was not to be effective until he received a copy thereof executed by UMW is at war with and a glaring departure from this Court's recognition in *Benedict* (361 U.S. 468-9) that a signatory

to the industry-wide coal agreement "entered into a long-term relationship" and assumed responsibility for the Fund's soundness and its management.

Further, the dissent of Chief Judge Biggs and the other Circuit Judges invites attention to the argument in the *Lowry* dissent that even if an oral agreement could be relied on by Mears in a suit by UMW, it could not be asserted as against the Trustees (A. 15a-16a, 19a).

Reliance by both the Third Circuit (A. 5a) and the district court (J.A. 21a) upon *Burke* v. *Dulaney*, 153 U.S. 228 (1894) is totally misplaced, since it antedated by many years the enactment of the statutes herein involved expressive of national labor policy, as well as the professions of the Supreme Court recognizing the necessity of implementing that policy. Moreover, it is noteworthy that both courts too placed heavy reliance upon *Similow* v. *Dickerson*, 357 Pa. 455, 54 A.2d 883 (1947), contrary to this Court's recent pronouncement, that where rights obtaining under collective bargaining agreements are concerned, "incompatible doctrines of local ~~labor~~ law must give way to principles of federal labor law." *Local 174, Teamsters* v. *Lucas Flour Co.*, 7 L. ed. 2d 593, 598.

It is to be remembered that the Trustees' rights to the delinquent royalties and Mears' obligation to pay them are contained in an irrevocable trust, created pursuant to Section 302(c) in a bargaining agreement for employees in an entire industry, and in *Benedict* this Court declared that "This collective bargaining agreement . . . is not a typical third-party beneficiary contract" (361 U.S. 459, 468). The *Lowry* dissent appropriately points to this Court's further holding in *Benedict* (361 U. S. 465) that the Trust Fund "is in no way an asset or property of the union" but is so independent of the union that a signatory employer was not permitted to use a money

judgment against the union as a set-off to a judgment against the employer in Trustees' favor (A. 19a). The *Lowry* dissent, logically and with substance, declared (A. 19a), "The Trust Fund's obligation to pay benefits to Lowry's employees could not be affected by secret understandings between the coal company and the union: neither may the employer's obligation to pay royalties to the Trustees be diminished by clandestine arrangements between the employer and the union".

Such declarations apply with equal force to the alleged understanding between Mears and the union representative.

Benedict emphasized that the trust created in this industry-wide agreement was to provide security for employees and their families (361 U.S. 468). The grossness of the Third Circuit's error is manifest by its utter unconcern and lack of consideration for these ultimate beneficiaries. Actually, the Third Circuit effectuates a burden that must be imposed in final analysis upon employees as the Fund's ultimate beneficiaries, innocent of any wrongdoing, who produced the coal from which flows Mears' obligation to pay the royalty upon such production. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 466. The *Lowry* dissent aptly argued that a trust which may be impaired by secret agreement is "at war with the law's underlying policy" (A. 19a). Similarly, there is vitality in Chief Judge Biggs' admonishment that the result of permitting labor contracts to be modified or nullified by covert conditions or stipulations between an employer and a union will inevitably result in industrial strife "and the stabilizing effect on labor relations" of the Act "will be destroyed" (A. 8a). Even if Mears could be regarded

as innocent of wrongdoing, which Trustees deny, as between himself and Trustees (who stand in the shoes of employees as the ultimate beneficiaries, *U.S.* v. *Carter*, 353 U.S. 210, 220), Mears is subject to the rule that when one of two innocent parties must suffer by the act of a third person, he, who by his act has enabled such third person to cause the loss, must sustain it. *Eliason* v. *Wilborn*, 281 U.S. 457; *Farmers Nat. Bank & Trust Co.* v. *Flexible Truck Corp.*, 3 Cir., 81 F. 2d. 541; *NLRB* v. *Industrial Cotton Mills*, 4 Cir., 208 F. 2d 87, 91.

In view of Mears' admission that he executed the collective bargaining agreement, that coal production resulted from the services of coal miners covered by such agreement, that Mears, by his own testimony, could not have sold his coal except by paying the royalty—and this at the insistence of coal buying customers (J.A. 51a, 54a, 57a) and the undisputed fact that Mears failed to claim he was not under a contractual obligation to pay prior to the instant action, it ill-behooves Mears who has already pocketed the royalty moneys received from his customers, to exhort the propriety of adherence to common-law principles, for the purpose of accomplishing a "windfall" at the expense of coal miners who are the ultimate beneficiaries of the Fund. Yet, this is the result achieved by the Third Circuit's opinion.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Petition for Writ of Certiorari should be granted and that such a Writ issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered in said case No. 13,502 on October 11, 1961, as well as said Court's order entered therein on

January 4, 1962, denying Petitioner's Petition for Rehearing.

Respectfully submitted,

VAL J. MITCH,
HAROLD H. BACON,
CHARLES L. WIDMAN,
907 Fifteenth Street, N. W.
Washington, D. C.

A. E. KOUNTZ,
ALEXANDER UNKOVIC,
WILLIAM G. BOYLE,
KOUNTZ, FRY & MEYER,
1424 Frick Building,
Pittsburgh 19, Pennsylvania.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Attorneys for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,502

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, *Appellants*

v.

EDWARD MEARS, individually and trading as MEARS COAL COMPANY

Appeal from the United States District Court for the Western District of Pennsylvania.

Argued June 19, 1961
Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges*.

OPINION OF THE COURT

(Filed October 11, 1961)

By KALODNER, *Circuit Judge*.

The plaintiffs, having suffered judgment against them below on a jury's verdict and their motions for a directed verdict and/or a new trial having been denied,[1] have brought this appeal raising these issues:

> (1) Did the trial judge err in permitting parol evidence to the effect that a Wage Agreement allegedly entered into between the defendant and the United Mine Workers of America ("Union") which required the defendant to make certain payments to the plaintiffs' Welfare and Retirement

---

[1] The Opinion of the District Court is reported at 189 F.Supp. 503 (W.D. Pa. 1960).

Fund was never consummated because a condition precedent to its consummation never occurred; and

(2) Did the trial judge err in his refusal to hold as a matter of law that (a) the defendant had ratified the contract, and (b) the defendant was estopped from maintaining that the contract was never consummated?

The plaintiffs, citizens of states other than Pennsylvania, are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 ("Fund"). The defendant is Edward Mears, individually and trading as Mears Coal Company, a resident of Marion Center, Indiana County, Pennsylvania. Jurisdiction exists by reason of diversity.

The Fund was created by the National Bituminous Coal Wage Agreement of 1950. The latter, as amended effective October 1, 1952, provided that each coal operator entering into it covenanted to pay into the Fund forty cents for each ton of coal produced for use or sale. This Agreement will hereinafter be referred to as the "1952 Agreement."

In December 1956 the plaintiffs brought suit against the defendant in the District Court of the Western District of Pennsylvania alleging that he had entered into the 1952 Agreement on October 31, 1952 and as a consequence was obligated to pay into the Fund forty cents on each ton of coal produced between October 1, 1952 and December 31, 1955 and that he had not discharged that obligation.

At the trial the defendant was permitted to testify, over the plaintiffs' objection, that when in October 1952 he signed the 1952 Agreement, as well as the 1950 and 1951 Agreements, he did so on the representation of Union's bargaining representative, Arthur Anderson, that the 1952 Agreement "wouldn't be a contract" until defendant "got the contract back signed and fully executed" by the Union. The defendant further testified that he had never received a copy of the 1952 Agreement signed by the Union and on this score it must be noted that the plaintiffs made no denial of that circumstance. The testimony established that the 1952 Agreement was signed by the Union subsequent to the time that the defendant signed it.

Anderson denied that he had agreed with defendant that the 1952 Agreement would not become effective until it was

signed by Union and a copy returned to defendant. He also testified that the defendant had signed the 1950 and 1951 Agreements on May 15, 1952, and not in October 1952 as defendant claimed.

The trial judge, pursuant to Rule 49 (a), Fed. R. Civ. P., 28 U.S.C.A., submitted to the jury in the first of two Interrogatories the specific issue as to whether Anderson had agreed with the defendant that the 1952 Agreement "would not become valid and enforceable" until the defendant had received a copy of it executed by the officers of the Union.[1] The jury answered "Yes" to this Interrogatory.

The second Interrogatory presented to the jury the issue as to whether the defendant had in writing advised the plaintiffs in April 1953 that he had cancelled the contract with the Union. The jury's answer to this Interrogatory was "No."

The issues submitted to the jury were limited to those presented in the two Interrogatories and the record discloses, as the trial judge noted in his Opinion, 189 F. Supp. 505, neither counsel requested "that any other issue of fact be submitted to the jury."

It must be noted, however, that the trial judge in his charge to the jury directed attention, as bearing upon the issue whether a binding contract had been entered into, to testimony adduced by the plaintiffs that the defendant had signed the 1950 and 1951 Agreements on May 15, 1952 and not in October 1952 when defendant said he had signed these Agreements

---

[1] The first Interrogatory read as follows:

"Did Arthur Anderson agree with the defendant Mears that the written instruments, Exhibits 1, 2 and 3, at the time they were signed by Mears, would not become valid and enforceable contracts until Mears received copies thereof executed by the Officers of the United Mine Workers of America?"

The record makes clear that Exhibit 1 was the 1950, Exhibit 2 was the 1951 Agreement and Exhibit 3 was the 1952 Agreement. It affords, however, no explanation as to why the 1950 and 1951 Agreements were included in the Interrogatory since the action here was premised on the 1952 Agreement. The District Court's Opinion throws no light on the inclusion of the two earlier Agreements. It stated, however, 189 F.Supp. 505, that "the interrogatories were submitted to counsel prior to their closing address to the jury, and neither counsel made any objection thereto. . . ."

along with the 1952 Agreement; that one Blizzard, an employee of the Fund, had on May 20, 1952 sent forms to the defendant relating to the tonnage payments and that the defendant had completed these forms and made payment in accordance therewith during the intervening months up to April 5, 1953;[3] and that the ledger records of the Fund evidenced royalty payments by the defendant as early as July 9, 1952.

Anent the foregoing the trial judge in his charge also called attention to the defendant's testimony that "although he had been paying royalties for a period prior to October, 1952, he did so not because he signed Exhibits 1 and 2 [the 1950 and 1951 Agreements] on May 15, 1952, but because he could not sell his coal unless he paid the royalties."

With respect to all this testimony the trial judge in substance instructed the jury that it must be weighed and evaluated in connection with the issue as to whether the defendant and Anderson had agreed that the 1952 Agreement (as well as the 1950 and 1951 Agreements), was not to become valid and binding until executed by the Union and a copy delivered to the defendant. At the same time the trial judge charged the jury that it was to consider all the other evidence adduced in arriving at an answer to the two Interrogatories.

Upon return of the jury's answers to the Interrogatories the trial judge advised the parties that he would postpone entry of judgment thereon in favor of the defendants until after oral argument on plaintiffs' motion for a directed verdict made prior to the close of the trial. Later, the trial judge denied plaintiffs' motion and subsequently denied their further motions "to reopen judgment and for a directed verdict" and for a "new trial.". This appeal from the denial of these motions followed.

We will first direct our attention to the issue as to whether the trial judge erred in permitting parol evidence designed to establish that the 1952 Agreement was not to become a contract until the defendant had received a copy of it signed by Union.

---

[3] It was stipulated by the parties prior to the trial that the defendant had paid royalties on tonnage produced between September 1, 1952 and February 28, 1953, during October 1952 to March 1953, inclusive.

Plaintiffs urge that the admission of this parol evidence violated both the parol evidence rule and the national labor policy. We do not subscribe to the plaintiffs' view. It is clear that the parol evidence rule has no application to the facts of this case. The challenged testimony was introduced to prove that the alleged contract never existed.

It is well-settled that parol evidence is admissible to prove that a contract did not exist. In Smilow v. Dickerson, 357 Pa. 455 (1947), the Pennsylvania Supreme Court in so holding stated (p. 462):

> "In the leading English case of *Pym* v. *Campbell*, 6 El. & Bl. 370, it is said: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." (citing cases)
>
> "It was said by Justice Harlan in *Burke* v. *Dulaney*, 153 U.S. 228 [1894]: 'The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract . . .' and parol evidence was admissible to show that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations."

As to the plaintiffs' contention that apart from the parol evidence rule national labor policy precluded the admission of the defendant's testimony concerning his oral agreement with Anderson it need only be said that while it is true that the Supreme Court has held that the federal courts may "fashion a body of federal law for the enforcement of collective bargaining agreements," Lewis v. Benedict Coal Corp., 361 U.S. 459, 470 (1960) and that national labor policy may require modification of the traditional rules of contract law in the case of these agreements, none of the cases cited by plaintiffs preclude the use of parol evidence to establish that an effective acceptance was not communicated by the offeree to the offeror.

In our opinion national labor policy does not require the exclusion of parol evidence which shows the lack of an effective acceptance of an offer.

There remains for disposition the points raised by the plaintiffs that the trial judge erred in his refusal to hold as a matter of law that (1) the defendant had ratified the contract and (2) the defendant was estopped from maintaining that the contract was never consummated.

On the score of the foregoing it need only be said that the trial judge made factual findings, in accordance with the jury's answers to the Interrogatories,* that the elements necessary to support conclusions of law that ratification and estoppel existed were not established by the evidence. We cannot say that these factual findings were clearly erroneous. It would serve no useful purpose to dwell further on these points in view of their extensive discussion by the trial judge in his opinion.

For the reasons stated the judgment of the District Court in favor of the defendant will be affirmed.

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Dated October 11, 1961.

---

* Rule 49 (a), Fed. R. Civ. P., 28 U.S.C.A.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,502

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, *Appellants*

v.

EDWARD MEARS, individually and trading as MEARS COAL COMPANY

OPINION SUR PETITION FOR REHEARING

(Filed January 4, 1962)

Present: BIGGS, *Chief Judge*, GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*.

PER CURIAM

There is not a majority of the Court in favor of granting the petition for rehearing. Accordingly the petition will be denied.

BIGGS, *Chief Judge*, dissenting.

Putting to one side any contention that Mears ratified the 1952 National Bituminous Coal Wage Agreement, that he is estopped to deny that he was bound by it, or that the parole evidence rule was violated, the court below and this court erred in holding that the terms of that Agreement might be nullified by an alleged oral prior or contemporaneous understanding that the terms of the Agreement should not be valid until it was delivered back to Mears. The royalty payments provided for by the Agreement were "really another form of compensation to the employees". Lewis v. Benedict Coal Corp., 361 U.S. 459, 469 (1960). As Chief Judge Sobeloff points out in his dissenting opinion in Lewis, Trustee, et al. v. Lowry, 295 F.2d 197 (4 Cir. 1961), the position taken by the majority emasculates the policy intended to be created by Congress in enacting Section 302(c)(5)(B) and vitiates the spirit of Section 8(d) of the Labor Management Relations Act, 29 U.S.C.A. §186(c)(5)(B) (Supp. 1960) and § 158(d). The federal courts

in fashioning a body of federal common law for the enforcement of collective bargaining agreements, Lewis v. Benedict Coal Corp., *supra*, p. 470, must shape that law so that such agreements cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union. If it be otherwise industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed.

For this reason I dissent from the order of this court denying rehearing en banc.

I am authorized to state that Judge Staley, Judge Ganey and Judge Smith join in the views expressed in this opinion.

No. 13,502

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge;* GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Dated: January 4, 1962

APPENDIX C

Section 8(d), Labor Management Relations Act, 1947 [29 USCA 158(d)]:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . "

Section 302, Labor Management Relations Act, 1947 [29 USCA 186]:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value

to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; . . . "

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8298

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Appellees*,

v.

F. ARNOLD LOWRY, individually and trading as LOWRY COAL COMPANY, *Appellant*.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.
TED DALTON, *District Judge*.

(Argued April 19, 1961 Decided September 16, 1961)

Before SOBELOFF, *Chief Judge*, and SOPER and HAYNSWORTH, *Circuit Judges*.

HAYNSWORTH, *Circuit Judge*.

Summary judgment was entered for the plaintiffs in this suit by the Trustees for the Welfare and Retirement Fund of 1950 (United Mine Workers of America) against a mine operator for "royalty" payments at the rate of forty cents per ton of coal mined by the defendant. We think the summary judgment was inappropriate in the light of the factual issues tendered.

From May 1955 to August 1958 the defendant was engaged in a strip mining operation in Harlan County, Kentucky. He employed three or four men at a time in the operation, and

---

Lewis v. Lowry, W.D. Va., 190 F. Supp. 490.

during the entire period seven different individuals were employed by him in the work.

The defendant claims that shortly after the operation commenced, a representative of the United Mine Workers, Floyd came to the job and demanded that he sign the National Bituminous Coal Wage Agreement of 1952 with its amendments. At that time, the defendant had only three employees, only one of whom, he claims, was a member of the U.M.W. Nevertheless, the defendant signed the agreement and later signed the subsequent agreements of 1955 and 1956. Though he admits that Floyd made no threats of any kind to him, he claims that he was duressed into signing these agreements because of his conviction, based upon violence in Harlan County, Kentucky in previous years, that, if he did not do so, he and his employees would suffer injury to their persons or their party. Perhaps inconsistently, but more importantly, the defendant claims that before signing the first agreement he explained to Floyd that he could not pay a royalty of forty cents a ton or the union wage scale; and that Floyd prevailed upon him to sign the agreement as a mere formality, but with the clear understanding that he would not be bound by it. The defendant says that he operated on that basis during the three years preceding 1955, and that it was recognized by Floyd that the defendant could not afford the wages and royalty payments specified by the national agreement, and that he was not expected to pay them.

The defendant also says that in performance he did not pay the wages required by the national agreement, that questions affecting working conditions were settled on the scene, and that he sent monthly checks to the plaintiffs in amounts which he felt he could afford and without regard to the tonnage of coal mined, this being in accordance with his claimed understanding with Floyd. These monthly payments to the plaintiffs were in small, even amounts. Seven of them were for $120 each, two of them were for $140 each, three of them were for $200 each, three of them were for $100 each, and the remainder were for similar, even, moderate sums. The total of these payments aggregated $3,264, and the defendant suggests that neither the plaintiffs nor anyone else could have supposed that such even figures could have been pased upon actual coal pro-

duction. He points to his actual production figures which when computed for each month to a fraction of a ton in tenths and multiplied by forty cents a ton, would invariably produce an odd dollar amount for the royalty payment.

The plaintiffs claim that payments aggregating $52,795.40 should have been made to them and seek the recovery in this action, after crediting the defendant with the $3,264 he paid, of $49,531.40.

On summary judgment, the plaintiffs concede, as they must, that Floyd did and said everything that the defendant says he did and they accept the other facts asserted by the defendant.

The plaintiffs stand on the parol evidence rule and upon a theory that the policy of the National Labor Relations Act gives some added protection to labor agreements attacked as sham.

Before we give consideration to the legal issues tendered, we think the factual situation should be more fully developed. The defendant seeks to bring himself within the usual rule that an agreement which is purely pretensive and delivered with no intention that it is to be binding upon either party may be shown by parol evidence to have created no contractual obligations.[2] It may be a salutary limitation upon the rule that the bare assertion of the party to be bound is not enough to show that the purported contract was a pretense and a sham,[3] but here the defendant claims corroboration in the circumstances of his performance.

On the present record we think the facts are not sufficiently established to determine whether the situation is governed by the rule which denies enforcement of pretensive agreements or by the rule which forecloses the use of parol evidence to establish a contemporaneous oral agreement to vary the terms of valid contract.

It is suggested, however, that a remand would be purposeless, and that the usual rule, which permits a party to show the real agreement, notwithstanding the existence of a pretensive

[2] Lewis v. Mears, W.D. Pa., 189 F. Supp. 503; and see Burke v. Dulaney, 153 U.S. 228, 14 S. Ct. 816, 38 L. Ed. 698; In re Hicks & Eon, Inc., 2 Cir., 82 F. 2d 277.

[3] Rock-Ola Manufacturing Corporation v. Wertz, 4 Cir., 282 F. 2d 208.

writing, is inapplicable to collective bargaining agreements. The contention is founded principally upon that provision in the National Labor Relations Act[4] which requires that a collective bargaining agreement be reduced to writing if requested by either party. We find, however, no such broad and collateral effect of the statutory provision.

The requirement that collective bargaining agreements be reduced to writing came into the Act after a history of refusal by some employers to make a memorial of agreements reached in collective bargaining negotiations. The Congress was of the opinion that refusal to record an agreement reached was not the sort of good faith bargaining required by the Act. The requirement, however, is directed to the real agreement of the parties. It does not make sacrosanct a pretensive agreement inconsistent with the real agreement reached in the collective bargaining process.

If negotiators in a collective bargaining session should arrive at a complete agreement on the eve of April Fool's Day and, out of a perverted sense of humor, should reduce to writing, sign, and distribute a pretensive agreement far from the real agreement they had reached, surely either party could show that the pretensive agreement was in fact pretensive, and the right of each to require that the real agreement be reduced to writing would be preserved. The requirements of the Act are directed to the protection of the real agreement of the partis and not to alteration of accepted principles governing proof of the terms of the real agreement.

If, therefore, it should be made to appear that the union, for the sake of its relations with the larger mine operators, or for any other reason, insisted upon execution by the small operator of an agreement which in fact was pretensive and not the real agreement of the parties, nothing appears in the federal statutes which would prevent disclosure and proof of the real agreement between the union and the mine operator.

Finally, it is suggested that the plaintiffs, the Trustees of the Welfare and Retirement Fund, may have some greater right to enforce a pretensive agreement than would either of the immediate parties to it. The rights of the trustees, how-

[4] 29 USCA § 158 (d).

ever, are entirely derivative. Their right to recover contributions from the mine operator is dependent entirely upon the real agreement between the operator and the union. The trustees have no independent right to insist that an operator make any contribution to the fund, or that it do so on the same basis and under the same formula that other operators contribute. The trustees are the third party beneficiaries of the real agreement between the union and the operator, which they may enforce in accordance with its terms, but the fact that the suit is brought for the benefit of the third party beneficiaries would not foreclose a defense that there was no contract or that the writing upon which the complaint is based is not, in fact, the real agreement between the operator and the union.[1]

The judgment will be reversed and the case remanded for further proceedings.

Reversed and remanded.

SOBELOFF, Chief Judge, dissenting:

The District Court's action was sound and its judgment should not be disturbed.

Remand to the District Court is worse than useless since it is for the purpose of establishing a legal irrelevancy. This course is not justified because the only possible result of a trial on the issue of "sham contract" would be to ascertain facts which could constitute no defense.

Lowry became a party to the industry-wide collective bargaining agreement which obligated him to make royalty payments to the Trustees of the Welfare and Retirement Fund at the rate of $0.40 per ton. He regularly paid the fixed amount upon the number of tons he reported to the Trustees, reducing the total payments by the simple expedient of understanding the tonnage in each of twenty-five payments made during the period in question. When the Trustees discovered from his

[1] One can imagine circumstances in which a pretensive agreement between the union and a mine operator might induce action by the Trustees or employees to their detriment. In such a situation an estoppel might arise or the union and the employer might be held responsible for the losses in a tort action. No such circumstances are developed on this record.

reports to other agencies that his production was much greater than he had accounted for to the Trustees, they demanded payment of the difference due. Lowry did not interpose the present defense of "sham agreement," but sought to defend the correctness of the remittances made by him. He would not, however, agree to an inspection of his production records, either by a certified public accountant of his own choice or by accountants from the Trustees' office. It happens that each of his seven employees whose names Lowry remembered in his deposition had been certified by him from time to time to collect, and did collect, benefits from the Trust Fund.

However, my dissent is based not upon the defendant's lack of equity, but upon broader grounds, for this is not just a small case involving a few miners. If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry wide.

There are three reasons why the defendant's allegations fail to constitute a defense to the suit by the Trustees. First, the statute authorizing agreements to establish industrial trust funds, properly interpreted, requires that such agreements shall be in writing. Second, broadly as a matter of federal labor law, the so-called "sham" exception to the parol evidence rule should not be allowed in suits under collective bargaining agreements. Third, even if a private oral agreement, said to

---

The present case involves no "April Fools' Day" joke, but is one of a series of attempts by coal operators over the nation to renege on their agreed-upon obligations with respect to the Union Welfare and Retirement Fund. For other cases where coal operators have attempted, unsuccessfully, to escape the payment of royalties to the Welfare Fund, some of them involving the same contentions as in the instant case and some involving different ones, see: *Lewis* v. *Fentress Coal and Coke Company*, 160 F. Supp. 221 (M.D. Tenn., 1958), aff'd 264 F. 2d 134 (6th Cir., 1959); *Lewis* v. *Mearns*, 168 F. Supp. 134 (N.D. W. Va., 1958), aff'd 268 F 2d 427 (4th Cir., 1959); *Lewis* v. *Quality Coal Corporation*, 270 F. 2d 140 (7th Cir., 1959), cert. denied 361 U.S. 929 (1960); *Lewis* v. *Cable*, 107 F. Supp. 196 (W.D. Pa. 1952); *Lewis* v. *Hixson*, 174 F. Supp. 241 (W.D. Ark., 1959); *Lewis* v. *Kerns*, 175 F. Supp. 115 (S.D. Ind., 1959); *Lewis* v. *Mill Ridge Coals, Inc.*, 188 F. Supp. 4 (E.D. Ky., 1960); *Lewis* v. *Young & Perkins Coal Company*, 190 F. Supp. 838 (W.D. Ky., 1960); *Lewis* v. *Gilchrist*, ... F. Supp. .... (N.D. Ala., decided April 6, 1961). For one case upholding a contention similar to that of the defendant in the present case, see *Lewis* v *Mears*, 189 F. Supp. 503 (W.D. Pa., 1960).

be the "real contract", could be relied upon by Lowry in a suit by the union, it cannot be asserted as against the Trustees.

I.

In section 302 of the Labor Management Relations Act,[2] Congress shows a concern for the abuses accompanying the growth of the industrial trust funds. Primarily, it was feared that if the management of the funds were left entirely in the discretion of union officials, the money contributed by employers and by employees might not be used for welfare purposes. As Senator Taft said, "Unless we impose some restrictions, we shall find that the welfare fund will become merely a war chest for the particular union * * *."[3] One of the safeguards imposed by the act is that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer."[4] According to the law's framers, the primary purpose of this provision was to enable employees to know what they were entitled to receive in welfare benefits and to be able to bring suit against the Trustees if necessary.

Literally read, section 302(c)(5)(B) may be thought to require that only the terms of the payments to the employees be in writing. Nevertheless, the protection of the employees is not complete unless the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing. Congress could not have intended to safeguard against the improper use of money once it has been contributed to the fund, but not against evasion of the primary obligation to contribute.[5]

Further, it would be inconsistent to read the statute to require that the agreement as to terms of payment to the fund be in writing and yet to permit an employer to claim the "sham" exception to the parol evidence rule. The royalty pay-

---

[2] 61 Stat. 157 (1947), as amended, 29 U.S.C.A. § 186 (Supp. 1960).

[3] 93 Cong. Rec. 4747 (1947).

[4] Labor Management Relations Act § 302(c)(5)(B), 61 Stat. 157-58 (1947), as amended, 29 U.S.C.A. § 186(c)(5)(B) (Supp. 1960).

[5] See *William Dunbar Co.* v. *Painters & Glaziers Dist. Council*, 129 F. Supp. 417, 423 (D.C. D.C., 1955).

ments are an indirect method of compensating the employees, and they have a right to know exactly what they are receiving for their services. They also have a right to know how well their union negotiators represented their interests. They are being deceived if the publicly declared, written agreement may be sapped by a secret compact. In addition, the establishment of this type of trust fund is generally made on an industry-wide basis. If some employers secretly contribute less than their shares, other employers may be forced to contribute more to enable the fund to meet its obligations. Assuming that different royalties may be charged different employers, the other employers are at least entitled to know when someone is paying less per ton than they are. If then Congress has required that the agreement be reduced to writing, it cannot be supposed to have contemplated that a party may come into court with the defense, "Yes, we have obediently put it in writing, but we did not mean it." The salutary scheme to cushion the financial impact on employees and their families of unemployment, illness, old age and death could be reduced to chaos by a succession of such defenses as that attempted here, bringing in its train a host of social evils.

II.

In respect to ordinary commercial contracts the high position accorded to written agreements, as witnessed by the parol evidence rule itself, may under some circumstances yield to the "sham" exception.[8] Nevertheless, as a matter of substantive labor law, courts should not permit the exception.

A collective bargaining agreement has been called a "generalized code"[9] for the industry to which it applies, and has been likened to a "charter, instrument of a system of industrial self-government, like words in a statute."[10] If these are valid

---

[6] *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 469 (1960).

[7] See *Lewis* v. *Benedict Coal Corp.*, *supra* at 469 (1960).

[8] The parties are in disagreement as to whether under Kentucky law, if applicable, the "sham" exception to the parol evidence rule is recognized. I find it unnecessary to decide this.

[9] *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) (Douglas, J.).

[10] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). See Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. R. v. 1, 22-36 (1958).

concepts, a union and an employer can no more make covert exceptions to the contract than a legislative body could to a statute which it adopts. Both are frauds upon the constituencies concerned. This is not to say that a collective bargaining agreement may never be oral, but where the parties have put it into writing, as in the usual case, it may not be varied by a contradictory oral agreement.

The union is not bargaining for itself alone, but as a representative of employees, and sometimes of others such as the Trustees in the instant case. It is imperative that the employees and other direct beneficiaries have a written embodiment of their rights and duties which can be ascertained by all. The public also has a right to know precisely what was agreed upon. If this "sham" exception is recognized, none of these interests will have any idea what the terms of the "real" collective bargaining contract are.

We must have regard for the spirit of the legislation. Section 8(d) of the Labor Management Relations Act[11] has recognized the importance of having a collective bargaining contract in writing by providing that bargaining in good faith includes a willingness to embody the agreement in writing at the request of the other party. See *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 523-26 (1941). A written labor agreement settles questions that if left unsettled could lead to industrial strife. Its purpose is to avoid strikes, walkouts, workstoppages and the like. If such written contracts can be nullified whenever the employer and union come to some other secret oral agreement, the purpose of the contract as an instrument of industrial peace may be frustrated.[12]

---

[11] 61 Stat. 142 (1947), 29 U.S.C.A. § 158 (d) (1956).

[12] The majority opinion suggests in footnote 5 that an employer might be estopped from asserting an oral understanding with the union contradicting their written agreement if it were shown that the Trustees or employees acted to their detriment. The simple answer is that specific detriment to these third parties is not required to be shown to invoke the rule against secret evasion of the written agreement because detriment is inherent in the frustration of Trustees' and employees' rights which has been fully pointed out above in the text.

III.

Even if it be assumed that in a suit by the union rather than the Trustees a sub-rosa understanding could be asserted by the employer, to allow the defense as against the Trustees would tend to undermine the statutory scheme for the creation of an irrevocable trust for the employees. The plan is one sponsored jointly by industry and labor and approved by Congress. The fund is jointly administered by representatives of employers and labor along with a neutral third party. It would be an unbearable incongruity, at war with the law's underlying policy, to allow the trust fund to be eroded in the manner proposed, for what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?

The Supreme Court in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 465 (1960), pointed out that a trust fund is in "no way an asset or property of the union." See 93 Cong. Rec. 4678 (1947) (remarks of Senator Ball). In that case the trust fund was considered so far independent of the union that although a money judgment had been rendered in favor of the employer against the union, the employer was not permitted to use it as a set-off to a judgment against the employer in favor of the trustees. The considerations bearing on the protection of the interests of beneficiaries, which were stressed in *Benedict*, apply in logic and common sense with no less force here. Royalty payments to the Trustees may not be curtailed by private oral agreements between an employer and a union, any more than they were permitted to be reduced by damage claims of the employer against the union. The Trust Fund's obligation to pay benefits to Lowry's employees could not be affected by secret understandings between the coal company and the union; neither may the employer's obligation to pay royalties to the Trustees be diminished by clandestine arrangements between the employer and the union.

IV.

The court's opinion treats the defense of coercion as frivolous, and with this I fully agree. No threats are claimed. The mere fear that if one will not sign the agreement there will be a strike or walk-out is not the kind of coercion that a

court will recognize as sufficient to invalidate an agreement. This is elementary.[2] Certainly no remand is warranted to take testimony in support of this "defense."

For the above reasons, I think that the order of the District Court should be affirmed. Remand erroneously implies that if the facts that have been asserted could be established, they would constitute a valid defense. With this I do not agree.

---

[2] See, *e.g.*, *Lewis* v. *Quality Coal Corporation*, 270 F. 2d 140 (7th Cir., 1959); *Lewis* v. *Kerns*, 175 F. Supp. 115 (S.D. Ind., 1959).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN L. LEWIS, et al., *Plaintiffs*

v.

EDWARD J. TOTH, *Defendant*

Civil Action No. 14875

TRANSCRIPT OF ORAL OPINION OF COURT

BY: Hon. Edward Thaxter Gignoux, D.J.

DATE: October 30, 1959

PLACE: Pittsburgh, Pennsylvania

COUNSEL PRESENT:

ALEXANDER UNKOVIC, Esq., *for Plaintiffs*

KIM DARRAGH, Esq., *for Defendant*

* * *

THE COURT: The Court is prepared to rule at this time, to announce his ruling, and to state the basis for its ruling.

The Court is prepared to do so inasmuch as the legal question presented by this motion was presented to the Court by a motion for directed verdict which was filed by the plaintiffs at the conclusion of the defendant's evidence and renewed by the plaintiffs at the conclusion of all the evidence, and the Court has had the time since the original motion was presented, after having heard the arguments of counsel and having considered the trial briefs filed by counsel, to review the authorities cited in the briefs and other authorities which have been called to the Court's attention which satisfy this Court as to what the decision should be.

The motion is granted. The Court accepts for the purposes of this ruling the proposition that the law as set forth in Section

473 of the Restatement of Contracts, 1932, that a contractual promise made with the intention of not performing it is fraud, is the law of Pennsylvania. Although a reading of the case of Nissenbaum vs. Farley, 380 Pa. 257, 1955, in conjunction with the case of International Milling Company vs. Hachmeister, 380 Pa. 407, 1955, leaves some question in the Court's mind as to whether the rule as set forth in the Restatement is the law in Pennsylvania, however, by accepting the Restatement rule as law of Pennsylvania, the Court is resolving that question most favorably to the defendant in the consideration of this motion. The Court also, in ruling upon this motion, has considered all the evidence in the light most favorable to the defendant and has drawn from the evidence the inferences which could be drawn most favorably to the defendant. It is the Court's understanding it is the Court's function for ruling on a directed verdict or motion for judgment n.o.v. under Rule 50 of the Federal Rules of Civil Procedure, so, viewing this record, it is the conclusion of this Court that no reasonable jury could find under the evidence presented to it in this case that fraud had been established as present in the negotiations which ended in the written contracts. The Court has in mind the Pennsylvania law that evidence of fraud when offered by the party to a written agreement for the purpose of avoiding the written agreement, must be clear, precise and indubitable, that law being set forth in the cases of Wagner vs. Somerset County Memorial Park, 372 Pa. 338, 1952, and Gerfin vs. Colonial Smelting and Refining Company, 374 Pa. 66, 1953, among other cases.

It is the opinion of this Court at most, if the defendant's testimony is to be believed, and apparently the jury did believe his testimony with respect to the first three contracts, the defendant has shown only a prior or contemporaneous oral agreement which he is barred from establishing to modify or vary the terms of the written agreement by the parole evidence rule as that rule has been developed and applied by the more recent decisions at least of the Supreme Court of Pennsylvania, the earliest Pennsylvania case apparently being the case of Gianni vs. Russell & Company, 281 Pa. 320, 1925, the law having been further developed through a series of cases including the case of Bardwell vs. The Willis Company, 375 Pa. 503, 1953, which, at page 507, contains a concise statement of the rule; and the

rule having been most recently stated both in the majority and in the dissenting opinions in the case of Boyd Estate, 394 Pa. 205, 1958, a case which was relied upon by both parties in this litigation in connection with their initial presentations upon the motion for directed verdict.

In the Court's opinion the actual holding of the Court in Boyd Estate is clearly distinguishable from the situation presented in this case by at least two factors, the first being that the subject matter of the alleged oral agreement in this case is the same as that contained in an express written provision of the written contracts, and the second being that in Boyd Estate the party who was seeking to enforce the written agreement had expressly admitted the contemporaneous oral agreement.

To summarize the Court's conclusions as to the Pennsylvania law as just stated, it seems to me that a fraudulent misrepresentation in promissory form may be established despite the parole evidence rule only where through fraud or because of the alleged fraud something was left out of or omitted from the written contract which, if it had not been for the alleged fraudulent promise, would have been included in the contract. In this case there is no allegation, nor is there any evidence, that the defendant ever wanted there to be any provision concerning his royalty obligation upon coal mined and sold by him to the Duquesne Power & Light Company, or that the defendant understood that there was any such express provision in the written contracts.

In addition, the written agreements here were the final step in a collective bargaining process under Section 8(d) of the Taft Hartley Act, and under that Act the parties to collective bargaining agreements are precluded from relying on prior or contemporaneous oral agreements. It was so held in Gatliff Coal Company vs. Cox, 152 F.2d 52, Sixth Circuit, 1945.

For the foregoing reasons, this Court has concluded that even accepting the evidence in the light most favorable to the defendant and drawing therefrom all inferences which can be drawn most favorably to the defendant, no reasonable jury could find that this evidence established fraud in the inducement of these contracts clearly, precisely and indubitably, and

this Court has no alternative other than to set the verdict aside and to enter judgment for the plaintiffs against the defendant in the full sum of the claim, which is $15,691.99 with interest. The Court is signing an order to that effect.

* * *

The Court will add to the order, which as presented calls for judgment in the amount of $15,691.99, together with interest and costs, the Court will insert, following the word "interest," the words "from this date."

* * *

Reporter's Certificate

I hereby certify that the foregoing pages contain a true transcript of the Order of Court entered on October 30, 1959 in Civil Action No. 14875 at Pittsburgh, Pennsylvania.

George Geiger
Official Reporter

November 10, 1959
Pittsburgh, Pennsylvania

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,153

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,

v.

EDWARD J. TOTH, individually and trading as TOTH CONSTRUCTION COMPANY, *Appellant*

Appeal from the United States District Court for the Western District of Pennsylvania

---

Argued June 7, 1960

Before BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*.

OPINION OF THE COURT

(Filed July 2, 1960)

PER CURIAM.

We have examined the record in this appeal and have considered carefully the arguments of counsel. We can perceive no error and consequently the judgment appealed from will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX F

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. George A. Bryant, et al, individually and trading as George A. Bryant & Sons Coal Co., a partnership	3223	U.S.D.C., E.D. Tenn. Southern Division	$19,946.01	Apr. 17, 1958
Lewis et al v. E. Dick Burrow, individually & trading as E. Dick Burrow Coal Co.	3153	U.S.D.C., E.D. Tenn. Southern Division	$23,560.00	Jan. 2, 1958
Lewis et al v. Willis Flynn, individually & trading as Willis Flynn Coal Co.	3455	U.S.D.C., E.D. Tenn. Southern Division	$21,350.48	Oct. 28, 1958
Lewis et al v. Howard Higgins, individually & trading as Howard Higgins Coal Co.	3369	U.S.D.C., E.D. Tenn. Southern Division	$12,452.15	Nov. 10, 1958
Lewis et al v. R. B. Ivey, individually & trading as R. B. Ivey Coal Co.	3434	U.S.D.C., E.D. Tenn. Southern Division	$23,082.22	Oct. 28, 1958
Lewis et al v. Will Land, individually & trading as Will Land Coal Co. and/or Will Land & Sons Coal Co.	3436	U.S.D.C., E.D. Tenn. Southern Division	$12,302.90	Oct. 31, 1958
Lewis et al v. Charlie Martin, individually & trading as Charlie Martin Coal Co.	485	U.S.D.C., E.D. Tenn. Winchester Division	$33,526.03	Jan. 30, 1959

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Ewing S. Hampton et al, individually and trading as Patrick & Hampton Coal Co., a partnership	3431	U.S.D.C., E.D. Tenn. Southern Division	$22,457.30	Apr. 21, 1958
Lewis et al v. Earl Patton, individually & trading as Earl Patton Coal Co.	3432	U.S.D.C., E.D. Tenn. Southern Division	$41,741.34	Oct. 6, 1958
Lewis et al v. Hampton E. Patton, individually & trading as Hampton E. Patton Coal Co.	3433	U.S.D.C., E.D. Tenn. Southern Division	$18,442.61	Oct. 6, 1958
Lewis et al v. James Patton, individually & trading as James Patton Coal Co.	3438	U.S.D.C., E.D. Tenn. Southern Division	$36,564.30	Dec. 9, 1958
Lewis et al v. J. W. Sanders, individually & trading as J. W. Sanders Coal Co., an individual proprietorship; and J. W. Sanders, et al, individually & trading as J. W. Sanders & Sons Coal Co., a partnership	3437	U.S.D.C., E.D. Tenn. Southern Division	$6,124.48	Nov. 10, 1958
Lewis et al v. J. A. Cordell, individually & trading as J. A. Cordell Coal Co. and/or Cordell Coal & Constr. Co.	492	U.S.D.C., E.D. Tenn. Winchester Division	$11,170.72	Mar. 19, 1959

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. H. A. Daffron, individually & trading as H. A. Daffron Coal Co.	3287	U.S.D.C., E.D. Tenn. Southern Division	$13,692.71	Jul. 16, 1958
Lewis et al v. M. T. Dixon, individually & trading as M. T. Dixon Coal Co.	3361	U.S.D.C., E.D. Tenn. Southern Division	$16,345.40	Oct. 28, 1958
Lewis et al v. J. J. Graham, individually & trading as J. H. Graham Coal Co.	3224	U.S.D.C., E.D. Tenn. Southern Division	$12,948.80	Apr. 17, 1958
Lewis et al v. W. T. Morrison et al, individually & trading as M. & T. Coal Co., a partnership	3286	U.S.D.C., E.D. Tenn. Southern Division	$35,898.15	Jul. 16, 1958
Lewis et al v. Marshall Meeks, individually & trading as Marshall Meeks Coal Co.	458	U.S.D.C., E.D. Tenn. Winchester Division	$46,113.36	Oct. 28, 1958
Lewis et al v. W. T. Morrison, individually & trading as W. T. Morrison Coal Co.	3284	U.S.D.C., E.D. Tenn. Southern Division	$21,494.40	Jul. 16, 1958
Lewis et al v. Hershel Myers, individually & trading as Hershel Myers Coal Co.	456	U.S.D.C., E.D. Tenn. Winchester Division	$15,170.12	Oct. 28, 1958
Lewis et al v. Waldo Myers, individually & trading as Waldo Myers Coal Co.	455	U.S.D.C., E.D. Tenn. Winchester Division	$11,757.30	Oct. 28, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Edward Nunley, individually & trading as Edward Nunley Coal Co.	486	U.S.D.C., E.D. Tenn. Winchester Division	$11,782.28	Jan. 30, 1959
Lewis et al v. Leon Nunley, individually & trading as Leon Nunley Coal Co.	459	U.S.D.C., E.D. Tenn. Winchester Division	$10,069.03	Oct. 28, 1958
Lewis et al v. Aaron Presnell, individually & trading as Aaron Presnell Coal Co.	3365	U.S.D.C., E.D. Tenn. Southern Division	$17,012.90	Oct. 31, 1958
Lewis et al v. F. W. Pryor, individually & trading as F. W. Pryor Coal Co.	3285	U.S.D.C., E.D. Tenn. Southern Division	$22,557.91	Jul. 16, 1958
Lewis et al v. George Ramsey, individually & trading as Ramsey Coal Co., an Individual proprietorship, Monteagle, Tennessee; and George Ramsey et al, Individually & trading as G. & E. Ramsey Coal Co., a partnership	462	U.S.D.C., E.D. Tenn. Winchester Division	$21,210.40	Nov. 10, 1958
Lewis et al v. Horace J. Scissom, individually & trading as Horace J. Scissom Coal Co.	3360	U.S.D.C., E.D. Tenn. Southern Division	$37,457.96	Oct. 28, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Howard Stephenson et al, individually & trading as Stephenson & Stephenson Coal Co., a partnership	3362	U.S.D.C., E.D. Tenn. Southern Division	$23,790.93	Oct. 28, 1958
Lewis et al v. J. H. Goforth, individually & trading as J. H. Goforth Coal Co.	3243	U.S.D.C., E.D. Tenn. Southern Division	$23,171.25	May 15, 1958
Lewis et al v. Dewey Trussell, individually & trading as Dewey Trussell Coal Co.	476	U.S.D.C., E.D. Tenn. Winchester Division	$15,436.00	Dec. 9, 1958
Lewis et al v. Rainbow Coal Corp.	628	U.S.D.C., E.D. Ky.	$23,345.60	Sept. 23, 1960
Lewis et al v. James C. Witten, individually & trading as Witten Mining Co.	661	U.S.D.C., E.D. Ky.	$11,458.57	Jul. 25, 1961
Lewis et al v. Dewey Cook, Jr., individually & trading as Days Branch Darby Coal Co.	1148	U.S.D.C., E.D. Ky.	$13,143.25	Aug. 26, 1961
Lewis et al v. T[illegible]nco, Inc.	3493	U.S.D.C., E.D. Tenn. Northern Division	$129,724.40	Mar. 13, 1958
Lewis et al v. Paul Gibbs, individually & trading as Paul Gibbs Coal Co.	419	U.S.D.C., E.D. Tenn. Winchester Division	$38,476.80	Mar. 6, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. James O. Large, individually & trading as American Pocahontas Coal Co.	690	U.S.D.C., S.D. W. Va.	$23,660.42	Dec. 27, 1961
Lewis et al v. Robin Red Ash Coal Co., a corporation	695	U.S.D.C., S.D. W. Va.	$24,337.25	Jan. 18, 1962
Lewis et al v. H. R. Gifford, individually & trading as H. R. Gifford Coal	290	U.S.D.C., S.D. W. Va.	$51,748.60	Dec. 27, 1961
Lewis et al v. F. Arnold Lowry, individually & trading as Lowry Coal Co.	673	U.S.D.C., W.D. Va.	$49,531.40	Feb. 16, 1959
Lewis et al v. Edward Mears, individually & trading as Mears Coal Co.	15288	U.S.D.C., W.D. Pa.	$3,395.93	Dec. 19, 1956
		Total	$1,007,561.66	

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,502

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, *Appellants*

v.

EDWARD MEARS, Individually and Trading as MEARS COAL COMPANY, *Appellee*

PETITION FOR REHEARING

Appellants respectfully petition this Honorable Court for a rehearing of the appeal in the entitled cause and in support of this Petition represent to the Court as follows:

I.

Appellants (herein also called "Trustees"), reserving their position as to each of the points of appeal, in this Petition address themselves primarily to those features of the decision, consisting of the Order and Opinion of Judge Kalodner on October 11, 1961, wherein it is believed that the Court has based its decision upon the application of incorrect legal principles.

Therefore, this Petition is devoted to the two major questions put to this Court upon appeal in an effort to convince this Court it has erred in its determination thereof.

II.

The Court, in its Opinion, at page 5, a copy of which is appended hereto,[1] has adopted the view that the parol evidence

[1] The Court's opinion appears as Appendix A herein, pp. 1a-7a. The abbreviation "A." refers to the Appendix to this Petition.

rule has no application to the facts of this case if the common law is to be applied, and further, that the National Labor Policy promulgated pursuant to the Labor Management Relations Act, does not prohibit the introduction of an oral condition precedent to a written collective bargaining agreement after it has been relied upon by third parties (A. 5a-6a).

A. The instant case is not one where the Court's vitiation of the bargaining agreement falls only upon the union as a party to an oral contemporaneous agreement. Rather, the effect of the Court's action herein places the burden of alleged oral agreements between a union and the employer asserting such agreements *upon employees*[2] who are the Fund's ultimate beneficiaries, innocent of any wrongdoing, and who produced the coal from which stemmed Mears' obligation to pay the royalty upon such production. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 466.

Yet, this vital factor is totally overlooked in the Court's opinion. Where, as herein, Trustees had no knowledge of an oral agreement at variance with the written contract, and Mears paid royalties, though inadequate, into the Fund and employees produced coal under the belief that a bargaining agreement existed, even if Mears could be regarded as innocent of any wrongdoing, as between himself and the Trustees (who stand in the shoes of the employees as ultimate beneficiaries, *U. S.* v. *Carter*, 353 U.S. 210, 220), Mears is subject to the rule that when one of two innocent parties must suffer by the act of a third person, he, who by his act has enabled such third person to cause the loss, must sustain it. *Eliason* v. *Wilborn*, 281 U.S. 457; *Farmers Nat. Bank & Trust Co.* v. *Flexible Truck Corp.*, 3 Cir., 81 F. 2d 541; *NLRB* v. *Industrial Cotton Mills*, 4 Cir., 208 F. 2d 87, 91.

Furthermore, the Court's application of the rule, that "parol evidence is admissible to prove that a contract did not exist", to labor agreements, and particularly to those which contain welfare fund provisions, must be appraised in the light of the Act's Section 302(c)(5)(B) and Section 8(d) [29 USCA 186(c)(5)(B) and 158(d)].

In Section 302(c)(5)(B), Congress mandated that the de-

---

[2] All emphasis herein are supplied.

tailed basis of welfare fund benefits be "specfied in a written agreement with the employer". The agreement herein conformed to that requirement. Such Congressional requirement emphasizes Trustees' assertion in their original Brief and herein, that Section 8(d) of the Act contemplated that their executed agreement contained the total agreement between the parties and excluded and foreclosed evidence of any alleged contrary oral agreement.

In a recent Fourth Circuit case (*Lewis* v. *Lowry*), Chief Judge Sobeloff in a dissenting opinion, challenged the majority holding that a secret agreement, about which Trustees had no knowledge, could constitute a defense to a suit by Trustees to collect delinquent royalties. The thesis of his dissent was that "the statute authorizing agreements to establish industrial trust funds . . . shall be in writing"; that "broadly as a matter of federal labor law, the so-called 'sham' exception to the parol evidence rule should not be allowed in suits under collective bargaining agreements" and "even if a private oral agreement, said to be the 'real contract', could be relied upon by" the employer "in a suit by the union, it cannot be asserted as against the Trustees".[3]

In dissenting, Chief Judge Sobeloff points out the Supreme Court in *Benedict* (361 U.S. 459, 465) made clear "a trust fund is in 'no way an asset or property of the union'" and that the primary purpose of Sec. 302(c)(5)(B) "was to enable employees to know what they were entitled to receive in welfare benefits"; and he cogently declares that employees "are being deceived if the publicly declared written agreement may be

---

[3] The Fourth Circuit's opinion and the dissent of Chief Judge Sobeloff, in *Lewis* v. *Lowry*, decided September 16, 1961, are printed herein as Appendix B, pp. 8a-19a. *A petition for a writ of certiorari in Lewis* v. *Lowry is currently being prepared and will be filed in the Supreme Court of the United States not later than November 24, 1961.*

Prior to the Fourth Circuit's recent *Lewis* v. *Lowry*, the Fourth Circuit reached a result contrary to *Lowry* in its *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, where it approved a trial court's holding (*Lewis* v. *Mearns*, DC, N.D. W. Va., 1958, 168 F. Supp. 134) which rejected a coal operator's contention that he was told the written contract was only a "formality" for the union's office records and that he need not pay the full royalty but only "what he could", the court declaring (168 F. Supp. 138) this evidence "At most" showed "only a prior or contemporaneous oral agreement" which is barred by both the parol evidence rule and the Act's Section 8(d).

sapped by" an alleged oral understanding not contained in the written agreement (A. 19a, 16a) and that

> "It would be an unbearable incongruity, at war with the law's underlying policy, to allow the trust fund to be eroded in the manner proposed, for what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?"

One may not gainsay, Trustees submit, that Section 8(d) recognizes the importance of bargaining contracts being in writing. Its purpose clearly is to avoid industrial strife by its compulsion of placing in writing the conditions of employment which, left unsettled or uncertain, lead to strikes and lockouts. If employees are to believe in the integrity of bargaining agreements under which they work; and if the contract's purpose as an instrument of industrial peace is to be implemented and sustained, then both the spirit and language of the Act demonstrate that the result reached in the Court's opinion is contrary to national labor policy and erroneous.

Long before Section 8(d)'s enactment, the necessity of an employer's executing a written memorial of his understanding with a union was proclaimed in *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514, wherein the written agreement was described as a "permanent memorial of its terms" and "the final step in the bargaining process" (pp. 523, 525). Therein, the Supreme Court recognized the preference that employees have "an authentic record" of their employment terms as contrasted with the employer's unilateral statement thereof (311 U.S. 524). In enacting Section 8(d) Congress, too, recognized the need for memorializing the agreement in a written instrument, and gave statutory emphasis to the Supreme Court's declaration that the written instrument was "the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife" (311 U.S. 524). A district court's holding that the National Labor Relations Act *"clearly precludes" a contemporaneous oral agreement* upon which a defense was based was approved by the Sixth Circuit in *Cox* v. *Gatliff Coal Co.*, D.C., E.D. Ky., 1945, 59 F. Supp 882, 886, aff'd, 6 Cir., 152 F. 2d 52.

Though Judge Kalodner, in his opinion (A. 6a) recites that "national labor policy may require modification of the tradi-

tional rules of contract law in the case of" labor agreements, it is difficult to perceive a situation where national labor policy would preclude the traditional rules of contract law if the instant case is not one for its application. The Court's refusal (A. 6a) to apply it in the instant case overlooks the Supreme Court's holdings in *Benedict* (361 U.S. 468-70) that "This collective bargaining agreement, however, is not a typical third-party beneficiary contract"; that "royalty payments are really another form of compensation to the employees"; that "as such the obligation to pay royalty might be thought to be incorporated into the individual employment contracts" and "Finally a consideration which is not present in . . . other third-party beneficiary contracts is the impact of the national labor policy".

Even prior to *Benedict*, the Supreme Court mandated that where federal labor policy is concerned, federal courts are obliged to fashion a remedy that will effectuate such policy and that application of common law may be resorted to only if it "will best effectuate the federal policy". *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457. Clearly, the instant situation is one which concerns federal labor policy. The Court's refusal to apply it herein certainly does not effectuate it in a situation where Trustees seek to recover moneys belonging to an irrevocable trust for the benefit of employees in the bituminous coal industry.

While the instant case is one brought by Trustees, the Court's error becomes even more glaring when it is considered that the agreement which has been vitiated through the medium of parol evidence embodied the terms and conditions of employment for each of the employees covered by it. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332. If one or more employees sought to sustain some contractual right against his or their employer, the principle enunciated in the instant case will, unless corrected, permit an employer, as a defense to the action, to assert some alleged agreement not found in the written instrument and which the employer would disclose, for the first time, at the time of itigation.

Indeed, even if Mears and the union had the understanding which Mears claims, neither the Trustees or the employees

should suffer the loss and benefit of royalties as a result thereof. In *Benedict* the Supreme Court refused to place the burden of damages flowing from the union's alleged breach of contract upon the Fund and expressed its concern with protecting the interest of the Fund's employee beneficiaries and declared that "Ultimately this might result in pressures upon the other coal operators to increase their royalty payments to maintain the planned schedule of benefits" (361 U.S. 469). These considerations, stated Judge Sobeloff in his *Lowry* dissent (A. 16a, 19a), "apply in logic and common sense with no less force" in a situation as here where operator endeavor seeks to curtail royalty payments by proof of an alleged oral understanding not contained in the executed agreement. As stated in the dissent (A. 19a): "The Trust Fund's obligation to pay benefits to" the employees "could not be affected by secret understandings between the coal company and the union; neither may the employer's obligation to pay royalties to the Trustees be diminished by clandestine arrangements between the employer and the union."

Even at common law an exception to the common-law rule which permits oral testimony of a condition precedent to the effectiveness of a contract is that "Where the written instrument contains a recitation that it embodies the entire agreement between the parties and that they shall not be bound by any representations, agreements or conditions not therein contained, then parol evidence is inadmissible to show the existence of an unfulfilled condition precedent not set forth in the instrument". *Rowe* v. *Shehyn*, DC, D.C., 1961, 192 F. Supp. 428, 431. Though the instruments herein involved did not explicitly so provide, since the Act's Section 8(d) provides that good faith collective bargaining includes "the execution of a written agreement incorporating *any agreement reached* if requested by either party . . .", which was the situation in the instant case, and under *NLRB* v. *Nash-Finch Co.*, 8 Cir., 211 F. 2d 622, "it is *conclusively presumed* that the entire engagement of the parties and *the extent and manner of their undertaking have been reduced to writing*", Trustees assert that Section 8(d) supplies to each and every collective bargaining agreement the language of the principle above quoted.

Furthermore, the Court's statement (A. 6a) that "national

labor policy does not require the exclusion of parol evidence *which shows the lack of an effective acceptance of an offer*" is erroneous in that it does not accord with the recorded facts. Contrary to the language quoted, the uncontroverted evidence is that after Mears admittedly executed the contract, United Mine Workers of America also executed it. Mears' defense was merely that he did not receive a signed copy, not that there was no effective acceptance of an offer, nor that there was no completed executed contract in existence.

The foregoing shows clearly the Court's error in its refusal to sustain Trustees' contention that admission of the alleged oral agreement was violative of national labor policy.

B. In their original brief, Trustees pointed out that the labor contract contained a *specific effective date*. The agreement recited (App. 134a), "This Amended Agreement . . . *shall be effective as of October 1, 1952* . . ." Trustees argued, as they do now, that Mears' testimony that "the contract wouldn't be a contract until I had gotten a copy of it back signed and completely executed" (App. 50a)[*] is at complete variance with the quoted effective date recital in the agreement, the admission of which violated the parol evidence rule.

Williston on Contracts, 3d Ed., Vol. 4, p. 1028, recites that "And even where the contract states that it is not to be effective until a certain contingency, a contemporaneous oral agreement that it shall take effect immediately is *inadmissible*". The present case presents the converse of the example in the Williston text, but the rule recited is equally applicable to the instant situation and clearly demonstrates the Court's error.

C. In the trial court and the Third Circuit, Trustees contended Mears ratified the bargaining contract and was estopped to deny its jural existence. Though Trustees do not herein detail the discussions to sustain those assertions, they do not waive them and invite the Court's reconsideration of these positions as found in their original brief, pp. 16-27 and reply brief, pp. 9-12. In a record where it is undisputed that for 11 months Mears paid royalties into the Fund, accompanying them with

[*] The abbreviation "App." refers to the Joint Appendix filed in this case.

check letters of advice pursuant to the agreement; he admitted owing moneys to the Fund under the contract; when asked to pay, he did not disclaim a contractual obligation but merely asserted financial inability; he never disavowed the agreement either to the union or the Trustees; he claimed to have written a letter cancelling the contract (a claim the jury rejected); on sixteen occasions subsequent to his admitted execution of the contract he used a Fund hospital card resulting in the Fund's expending $943.14 for hospital and medical care for his wife, it is not understandable how the Court, in addition to holding the contract never had legal existence, could hold, as it did, that the district court's findings on ratification and estoppel were not clearly erroneous.

CONCLUSION

Throughout the instant appeal, Mears has emphasized this is a small case involving a small operator with few miners. The Court should not, however, lose sight of the fact that the Agreement involved is industry-wide and its opinion and judgment herein will stand as an invitation to coal operators across the country to nullify their agreements through the medium of alleged oral agreements. As Chief Judge Sobeloff points out in the *Lowry* dissent (A. 14a), the present case "is one of a series of attempts by coal operators over the nation to renege on their agreed-upon obligations" to the Fund, pointing to nine other such federal court cases exclusive of *Lowry*. Indeed, the Court's decision and opinion, if permitted to stand, provide a weapon for employers not only in the coal industry but in every other industry by which to evade their collective bargaining contractual obligations and thereby to frustrate and defeat national labor policy by rendering nugatory written bargaining agreements which the Supreme Court in *Heinz* proclaimed "as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife" (311 U.S. 524).

It is respectfully submitted that the Court's opinion and judgment in the instant case are clearly in error and should be reconsidered upon the rehearing sought herein, and that

argument on rehearing be heard before the entire Court in banc pursuant to Rule 4(3) of the Rules of this Court.

VAL J. MITCH
HAROLD H. BACON
CHARLES L. WIDMAN
907 Fifteenth Street, N.W.
Washington 5, D. C.

ALEXANDER UNKOVIC
WILLIAM G. BOYLE
KOUNTZ, FRY & MEYER
1424 Frick Building
Pittsburgh 19, Pennsylvania

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia
Attorneys for Appellants

CERTIFICATE

The foregoing Petition is presented in good faith and not for the purpose of delay.

CHARLES L. WIDMAN
Attorney for Appellants

[NOTE: Included in the Appendix to the Petition For Rehearing were Opinion dated October 11, 1961, of the United States Court of Appeals for the Third Circuit, *Lewis et al* v. *Edward Mears, etc.* and Opinion dated September 16, 1961, of the United States Court of Appeals for the Fourth Circuit, *Lewis et al* v. *F. Arnold Lowry, etc.*, which are printed in the Appendix to the instant Petition For Writ of Certiorari as Appendix A and Appendix D, respectively, and therefore are not repeated.]

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 2, 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 837

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Petitioners,

vs.

EDWARD MEARS, Individually and Trading as MEARS COAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

J. LEE MILLER,
MILLER & MILLER,
935 Porter Bldg.,
Pittsburgh 19, Pa.

BATAVIA TIMES LAW PRINTERS
JOSEPH F. FERRO REPRESENTATIVE
617 INVESTMENT BLDG. PITTSBURGH 22, PA. COURT 1-3595

INDEX.

	PAGE
Question Presented	1
Counter Statement of the Case	2
Argument	6
Where a party, busy farming at the time, is solicited to place his signature on a blank, undated and unexecuted collective bargaining form which at the time is admittedly not a contract, and where he does so with the specific agreement of the authorized representative of the other party that no contract is to exist until he received back a completed copy and knowing that the contract when consummated was cancelable, and where he never receives a copy or is informed of any completion, has a contract been consummated?	6
Evidence of conditional delivery of signed form properly admitted	6
There is neither confusion among the courts nor any change in the above law requiring Certiorari	8
Conclusion	19
Appendix—Excerpts from Opinion of Trial Court	21

TABLE OF CASES.

Burke v. Dulaney, 153 U. S. 228	6
Gatliff Coal Co. v. Cox, 152 F. 2nd 52	11, 12
H. J. Heinz Co. v. Labor Board, 311 U. S. 514	11, 12

PAGE

Lewis v. Benedict Coal Corp., 361 U. S. 459 11
Lewis v. Cable, 107 F. Supp. 196 13
Lewis v. Toth, 280 F. 2d 422 ..... 11, 14
NLRB v. Nash-Finch Co., 211 F. 2nd 622 ..... 15, 16
Smilow v. Dickerson, 357 Pa. 455 6

STATUTES.

Act of Congress:
Section 302 (c) 19
Section 8 (d) 19
Collective Bargaining Law 14
Labor Management Relations Act 19
National Labor Relations Act 13
Wagner Act 13
8(d) 13

MISCELLANEOUS.

Restatement of the Law of Contracts, Chapter 9, Sect. 241 7
Wigmore on Evidence 6
3d Ed., Vol. IX, Sect. 2410, pp. 30-33 7
Williston on Contracts, Revised Ed., Vol. 3, Sect. 634, pp. 1823-1825 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,

Petitioners.

vs.

EDWARD MEARS, Individually and Trading as MEARS COAL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent Edward Mears, individually and trading as Mears Coal Company, in opposition to the Petition for a Writ of Certiorari filed herein, respectfully represents:

Question Presented

Where a party, busy farming at the time, is solicited to place his signature on a blank, undated and unexecuted collective bargaining form which at the time is admittedly not a contract, and where he does so with the specific agreement of the authorized representative of the other party that no contract is to exist until he received back a completed copy and knowing that the contract when consummated was cancellable, and where he never receives a copy or is informed of any completion, has a contract been consummated?

Counter Statement of the Case

Petitioners' petition presents a policy argument. Since the application of matters of policy can be devastating to individual rights in our system of law, it is most important that the facts over which Petitioners seek to throw a blanket policy, never heretofore done by any Court, be known and understood by this Court.

In 1950, the Defendant Edward Mears, a young man of 22 years (53a) lived on and helped operate the family farm where he was born and raised (46a). Defendant still resides on this 165 acre farm owned by his parents at Marion Center, Pennsylvania, a small farming community in Indiana County. Farming being a seasonal operation, Defendant Mears also drove a truck hauling coal (46a). In 1950, *some two years prior to the existence of the mine here in dispute* (72a). Defendant Mears was required by the United Mine Workers of America to join their union as a truck driver (72a). He did so without objection. At this time *long before the existence of this small mine* on his father's farm, the *Plaintiff Welfare Fund issued the De-*

tendant a Hospital Card entitling him to Fund benefits (72a). During the entire period covered by this proceedings, Defendant was a member of the Union in good standing with dues and assessments fully paid up and working two or three days a week as a truck driver for a signatory operator (72a, 79a, 80a).

In 1952, Defendant opened a small mining operation on the back of the farm. He worked in the mine himself with the assistance of one or two other men (64a).

In October of 1952 Arthur Anderson, the Union's authorized representative came out to the Mears Farm to see Defendant who was at the time in the fields sowing wheat (47a). Anderson called Mears over and presented *blank forms* (41a) on which Defendant placed his signature resting same on the hood or trunk of an automobile (42a, 51a). These forms, long and very detailed, were delivered to Mr. Anderson upon his representation to the Defendant that "*Mr. Anderson said the contract wouldn't be a contract until I got the contract back signed and completely executed*" (50a). While Mr. Anderson initially denied such a condition, it should be noted that upon cross examination he at first hedged a bit (42a) and upon being pressed, finally admitted that he thought it *was part of the arrangement that Defendant was to get a copy of the executed contract back* (105a).

Defendant testified that for some months prior to the above meeting he was required by certain coal companies to pay the royalty to sell his coal, and that he did in fact pay it for some months prior to signing the contract blanks (56a, 57a). This is confirmed by Mr. Blizzard's statements that if Plaintiffs receive payments they set up an account (98a, 99a) and by the fact that the *original* date on Exhibit

s (May 2 or 4, later changed to May 15) was prior to the date even Plaintiffs say the contracts were signed (99a, 100a).

It is important to note that no one claims that Defendant delivered a "contract" to Anderson for the obvious reason that his was the only signature thereon. At later times, which times are not specified in the record and of which Defendant was never informed, these forms were dated and certain information was inserted therein, signed by Anderson, forwarded to the local Union for signature, and forwarded to Washington for the signature of John L. Lewis. Plaintiff does not claim nor attempt to prove in any manner that Defendant was informed of these actions nor that he was sent a copy of the document. In accordance with instructions from Mr. Anderson (71a) he paid the royalty for about four months pending receipt of the documents which never came. About March or April, 1953 this small mine was shut down by the State Mining Inspector since it had no source of ventilation except what air naturally entered the mine (51a, 52a). On April 5, 1953 Defendant notified Plaintiff by its check letter of advice (152a) marked "Last order and shut down by inspector". After some weeks Defendant commenced work to remedy this and after several months (52a) was able to install a fan with the help of one other man and thereafter re-commenced mining on the same basis as before. No claim of any kind for coal mined after this was ever made by the Union or the Fund until some years later (1956) when Exhibits 6 and 7 (Letters) were forwarded, obviously in preparation for this proceedings. The only communications other than this involved a sum of $66.00 claimed by the Fund when they raised the royalty from 30¢ per ton to 40¢ per ton and Defendant was not aware of it. During

the brief period while he was paying and waiting to hear if the Union accepted it made a $66.00 difference (85a).

The Court submitted two questions to the jury, the one being here relevant as follows: "1. Did Arthur Anderson agree with the Defendant Mears that the written instruments, Exhibits 1, 2, and 3 at the time they were signed by Mears, would not become valid and enforceable contracts until Mears received copies thereof executed by the officers of the United Mine Workers of America." *Plaintiffs made no objection to the case being so submitted* (108a, 110a) *nor any objection to the charge of the Court* (119a) after the case was so submitted. See also the opinion of the Trial Court (19a) wherein is stated, "* * * nor did either counsel demand that any other issue of fact be submitted to the jury".

The jury answered said question "Yes" (120a).

It is also important to know that said case is not a "sham" case such as the Lowrey Case wherein the parties admit that an agreement exists but state that they had a secret oral agreement which contradicts the written agreement's terms.

ARGUMENT

Where a party, busy farming at the time, is solicited to place his signature on a blank, undated and unexecuted collective bargaining form which at the time is admittedly not a contract, and where he does so with the specific agreement of the authorized representative of the other party that no contract is to exist until he received back a completed copy and knowing that the contract when consummated was cancelable, and where he never receives a copy or is informed of any completion, has a contract been consummated?

Evidence of conditional delivery of signed form properly admitted

The Supreme Court of the United States clearly expounds the law in such circumstances in *Burke v. Dulaney*, 153 U. S. 228:

> "The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract * * * and parol evidence was admissible to show that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations."

Smilow v. Dickerson, 357 Pa. 455 is extremely important in that it not only recites the Pennsylvania law, but also quotes the Supreme Court of the United States (as above), English law on the subject and Wigmore on Evidence:

> "In the leading English case of Pym v. Campbell, 6 El. & Bl. 370, it is said: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible.'"
>
> * * *

"Wigmore on Evidence, Vol. IX, Section 2410 states • • • the finality of the writing as a jural act depends upon the circumstances of each case; that it may be left to depend on a third person's assent or upon any other precedent condition • • •

"It is elementary that evidence is always admissible to attack the integrity of an instrument as a whole and to show that an apparently valid agreement was not in fact intended by the parties to be a genuine and binding contract. Under such circumstances the rule against attempting to alter the terms of a written agreement by parol evidence has no application whatever."

Restatement of the Law of Contracts, Chapter 9, Sect. 241 states:

"Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Wigmore on Evidence, 3d Ed. Vol. IX, Sect. 2410, pp. 30-33 states with reference to the parol evidence rule:

"The case of Pym v. Campbell, in England, is commonly taken as the leading one. .

"In the United States, the doctrine is not only completely accepted, but has even been applied to sealed instruments other than deeds of land in jurisdictions still bound by precedent to the older rule for deeds • • •."

In *Williston on Contracts*, Revised Ed., Vol. 3, Sect. 634 at pp. 1823-1825 the following appears:

"Accordingly, it may be shown by parol evidence not only that a writing was never executed or delivered as a contract • • • but also • • • that the parties agreed by parol that the writing in question should not become

effective until some future day or the happening of some contingency, if this is not inconsistent with the express terms of the writing."

Petitioners' position is clearly fallacious in any event, since the evidence objected to is in no way an attempt to vary the terms of the writing. The fact that no contract was to be consummated until Defendant received back a copy (logically expected a few weeks later) did not vary the terms of the writing in any way. Had Defendant been provided with an executed copy in the manner agreed to, a contract would have resulted and the terms would have been exactly as specified in the writing. As stated in the Opinion of the Trial Court (23a):

"There was no attempt to alter, vary or contradict any term of the alleged contract in the instant suit; the Defendant was simply permitted to show that no contract existed, which as we have seen, was not in violation of the parol evidence rule."

There is neither confusion among the courts nor any change in the above law requiring Certiorari

It is interesting to note that *every case cited by Plaintiffs in their Petition is based upon a fully executed contract consummated under known common law principles.* No case cited purports to hold that parties were under a contractual relationship until all known requirements of a common law contract had been met.

Plaintiffs here seek to establish a policy whereby, in collective bargaining contracts, there need be no meeting of the minds, no offer and acceptance prior to the existence of a contract. It should be noted that no case, and no Act of Congress purports to change the manner or requirements whereby a Union and Employer become bound to each other by Contract.

It is submitted that these Plaintiffs would be furthering the real National Labor Policy, as well as increasing the stature of the Labor Movement, were they to openly admit that the Union's authorized representative and Defendant made a conditional arrangement which would be valid in all segments of our economic society, and that they have arrived at such stature as to fit into society's legal and economic pattern along with other reputable interests.

Plaintiffs' entire petition is based upon an obviously fallacious factual assumption—that an "agreement" existed. They state (P. 6) "not only did Mears admit executing the *agreement*" (emphasis ours). No such admission is made now by Defendant nor was it ever made by Defendant. As stated heretofore such is an impossibility. *Defendant signed a blank, undated form* (102a, 103a) which as admitted by all, had to have several things done to it before it could possibly become an "agreement". This was the last Defendant ever heard of this until some years later. The evidence here clearly shows—Plaintiffs' witness tacitly even admits it (105a)—that the Union representative Anderson solicited Mears' signature to the blank undated form at a place and time where it could not possibly be examined, with no other signatures thereon, with the specific agreement that "Mr. Anderson said the contract wouldn't be a contract until I got the contract back signed and completely executed" (50a). Mr. Anderson, the Plaintiffs' own witness and only other person present at the time, when asked if this was not part of their arrangement, says "I think I told him he'd get one" (105a).

How these undated blank forms with only Defendant's signature thereon could possibly be the "executed agreement" which Plaintiffs so blandly speak of as "the final step in the bargaining process" is beyond comprehension.

To hold that a contract exists when one party only signs a blank form never knowing whether or not the other *ever* signs is indeed a giant step forward in Plaintiffs' attempt to knock down common law principles in their way. It should be noted that the Plaintiffs do not even attempt to show that Defendant was given the courtesy of being informed of the Union's later actions. Is it Plaintiffs' position that we have so completely removed collective bargaining from "ordinary common law contracts" that the Union is no longer required to notify parties with whom it seeks to make a contract of its decision? Is it Plaintiffs' position that the Courts have limited the requirement of "meeting of the minds" as not being applicable to this type of agreement? Certainly the law has taken no such position. The logical answer to Plaintiffs' statement that the signed agreement is the "final step in the bargaining process" is that *said statement is true but in the instant case the "final step" was never taken—there was no "agreement" in any sense of the word.*

Said signature was solicited of Defendant at a time and under conditions when he could not possibly make a fair analysis of this involved document. It is only logical and fair to permit an individual the usual legal rights in such circumstances. Plaintiffs quote the labor-management relations act defining collective bargaining in their petition at Page 8a. Among other things is stated the responsibility to meet "at reasonable times". It is submitted that the Union Organizer Anderson picked anything but a "reasonable time" in calling Defendant from his tractor to the side of a wheat field to "bargain collectively". What is more logical than a man attaching a condition as was attached under these circumstances? And likewise, what is more logical than the law of the land protecting him until he

does get back a signed copy so that he may examine same under suitable circumstances?

It is interesting to note that nowhere in Plaintiffs' entire petition do they cite a case even remotely similar in fact to the case at bar. It is also worthy of note that the *Trial Court, at the argument of the Plaintiffs' motions, called upon Plaintiffs to produce one case where their theory had been upheld in the absence of a completed contract.* Needless to say, no case has been discovered by anyone where the principles they advocate have been applied. In lieu thereof Plaintiffs have been forced to make use of broad general statements from cases not even remotely similar in nature to the case at bar. For this reason the factual and legal problems faced by the Courts in the Gatliff case, the H. J. Heinz case, the Benedict case, the Toth case, etc. are nowhere mentioned. It is felt that a brief discussion of the cases upon which Plaintiffs rely will point up with clarity that nowhere has any Court attempted to alter or change this well established portion of the parol evidence rule.

Lewis v. Benedict Coal Corp., 361 U. S. 459 is a case where *all parties admit the existence of a valid completed contract.* The operator there attempts to set off against a royalty claim by the Fund, his damages sustained by unlawful strikes by the Union. The Court held that such damages as may have been suffered by the employer by acts of the Union could not be set off against the third party beneficiary's fund. The Court's statement there granting a "more secure and stable position in our national economy than that of ordinary common law contracts" applies only to this third party beneficiary status of a welfare fund in such agreements. The Court expresses fears that otherwise damage claims against the Union could fall on

the employees by consuming the Fund. Certainly there *is no language anywhere in the opinion to suggest that any of the age-old requirements necessary to constitute a contractual relationship were even being considered by the Court.*

Gatliff Coal Co. v. Cox, 152 F. 2nd 52, again is a case where *all parties admit the validity of a fully operative contract.* Defendant employer was proceeded against by certain employees claiming that they were paid less than the wage called for in their labor contract. Defendant attempted to set up as its defense that while the written contract provided one set of wages, they had an oral arrangement that certain employees were to be paid less. Such a defense would be a clear violation of the parol evidence rule. The very words of the case show that the Court in the Gatliff case had no intention of changing the parol evidence rule as it applies to making a contract but aimed solely at a distinction between collective bargaining contracts and "ordinary common law contracts which may be altered at pleasure". This is clear where the Court specifically renders "* * * ineffectual and unavailable any collateral agreements between individual members of the collective bargaining group designed to obtain a diminution of the obligations * * * to particular employees under the collective agreement * * *". It is plain that the existence of a valid contract is a basic requirement. Nowhere does the Court indicate or even infer any change in the law that a party may require that he receive a signed copy of the document back before any contractual relationship arises.

H. J. Heinz Co. v. Labor Board, 311 U. S. 514 is a case where *all parties admit to the existence of an agreement* covering wages, hours and working conditions but the employer refused to put it in writing. The Court held that

where such agreement existed, refusal to put it in writing was a violation of the National Labor Relations Act. It is obvious that when the Court there held that a written agreement was the "final step in the bargaining process" it meant to place an obligation up *both parties* to complete the process—*exactly what the Union did not do in the case at bar.* The obvious purpose of the Court was to crystallize that provision of the Wagner Act (8(d)) requiring "the execution of a written contract * * * if requested by *either party.*" *Said case not only doesn't help Plaintiffs in the case at bar, but in fact hurts them for the reason that the condition insisted upon—i.e. that Defendant get back a signed copy—is in effect a request by Defendant for "the execution of a written contract", a right specifically given to either party by the Wagner Act.* So far as Defendant knew, this was never done from 1952 through 1956. Defendant logically presumed the transaction terminated and certainly is not obliged to pressure the Union into doing what not only the common law requires, but also the Act of Congress.

Plaintiffs attach great significance to the case of *Lewis v. Cable*, 107 F. Supp. 196 although the facts of that case are poles apart from the facts of the case at bar. In the Cable case there was a *valid existing contract in force* at all times, having been made by the coal association to which Cable belonged, which is customary in the industry. The facts there show that the Fund wrote the operator claiming payment under "* * * the terms and provisions of the National Bituminous Coal Wage Agreement of 1948", and that the operator answered and admitted the obligation. The Court held that by his acts he did "intend to be bound" since he admitted the obligation by letter and paid over $9000.00 to the Fund over a long period of time with no

other reason. Compare this to the case at bar where Defendant Mears signed a blank form, paid a nominal amount upon instructions of the Organizer while waiting for his completed agreements. Then, never hearing from the Union and not knowing what his status was, a short time later he attempted to cancel whatever his status was by notice to the only address he ever heard of stating "Last order and shut down by inspector". The mine was in fact shut down by the inspector for a period of months (52a). It is worthy of note that the alleged contracts may be cancelled by either party by appropriate notice and that no reason is required.

Lewis vs. Toth, 280 F. 2d 422 *again is a case where a fully executed contract is admitted by both parties.* Defendant attempted to set same aside on the ground of *fraud in the inducement.* The Court held that there was insufficient evidence to establish fraud. There is not the slightest indication that the Court was there considering the legal requirements for the existence of contractual relations for the obvious reason that all parties admitted its existence from the beginning. By *dicta* the Court shows that the parol evidence rule is clearly part of Collective Bargaining Law when it states "* * * the defendant has shown only a prior or contemporaneous oral agreement which he is barred from establishing to modify or vary the terms of the written agreement by the parol evidence rule * * *." In the case at bar, the opinion of Trial Court states (23a):

> "There was no attempt to alter, vary or contradict any term of the alleged contract in the instant suit: the Defendant was simply permitted to show that no contract existed, which as we have seen, was not in violation of the parol evidence rule."

Louis vs. Mearns, cited by Petitioners likewise is a case where *a written contract was admittedly completed*. Defendant then attempted to *vary the terms* of the written contract by a prior or contemporaneous oral arrangement. Actually the Mearns case was a "Sham" case where all parties admitted a formal written contract drawn under the usual common law rules, but Defendant claims a secret agreement with the organizer to the effect that he did not have to do what the formal contract required. This is a clear violation of the parol evidence rule, and would be so in any field of contract law. Compare this to the case at bar where Defendant makes no attempt to vary any term of any agreement but merely makes the sensible arrangement that no contract is to exist until he receives back an executed copy so he may examine same at a place more suitable than the side of a wheat field. Had the Union returned his executed copy, Defendant would have been bound by every term therein, or would have known how properly to terminate the arrangement.

NLRB vs. Nash-Finch Co., 211 F. 2nd 622, a case cited by Petitioners in the court below, is omitted from their Petition to this Court for obvious reasons. *Again both parties admit the existence of a valid completed contract.* The facts of said case show that prior to the Collective Bargaining Contract the employer provided certain insurance and bonus benefits for his employees which were not included in the Bargaining agreement. The Court held that these benefits were not available to the employees if not in the contract. This explains clearly what the Court there meant in stating that where there is a completed contract "it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing". The

Nash-Finch case facts as in the case at bar, show that the contract form was given to the employer by the Union. *On July 20, 1951 the President of the Company signed it and delivered it to the Union. No contract was at this time consummated in the minds of anyone for the simple reason that the Union held this incomplete document until July 23, 1951 when the Union met with the Employer and amended Paragraph 5. Only then did the Union sign the document which ripened into a binding agreement.* It is interesting to note that in the Nash-Finch case the Union itself did not treat the contract as binding with only the employer's signature thereon but amended it and considered it a contract only when it had executed the document three days later at a meeting with the employer. *So also in the case at bar the Union at any time prior to informing Defendant formally of its acceptance and returning him a copy, could have amended it's offer or even refused the transaction entirely.* A thorough examination of this case shows clearly that there is nothing in the opinion of the Court to indicate that this Court or any other one feels that a party such as Defendant should not have the right to know that a document has been completed before it becomes operative. The very part of the Nash-Finch case quoted by Plaintiff in the court below limits the case to a completed contract "without uncertainty as to the object or extent of such engagement". No such situation exists in the case at bar.

Petitioners also seek Certiorari on the grounds of dissenting opinions cited in their Petition. It is most important to note that the decision by the United States Court of Appeals for the Third Circuit on the subject case was ***unanimous.*** The dissent referred to was only on a petition for re-hearing and it is important then to note that *all of*

the judges who heard the oral argument and had the briefs explained remained in their former unanimous opinion for Defendant. No dissenting judge had heard the oral argument or briefs explained. It seems obvious that if there were the slightest disagreement among those judges most familiar with the case, a re-hearing would have been granted. Instead, the original hearing judges remained unanimous in their holding in Defendant's behalf. The dissent demonstrates an understandable lack of full knowledge of the facts in this case, in that it would hold that where Defendant signed a blank form, he was under contract even though the other party was not, and could thereafter renounce or change the terms.

The Lowry case, dissent to which is referred to is another "Sham" case wherein Defendant *admits the written contract* but claims he had a clear understanding that he was not to be bound by the terms of it. Excepting for *dicta* therein neither the majority nor dissenting opinion is applicable to the case at bar. There was no "Sham" or "Secret" agreement by Defendant Mears. Had the agreement been consummated, he would have been bound by the terms thereof as spelled out in the agreement. In addition, he would have been aware of its existence and the acknowledged means of terminating it. Mears neither claimed, nor was there any evidence of, any "Sham" agreement. The case at bar has no comparison to the Lowry case or the other cases cited wherein the employer and organizer attempted a nefarious avoidance of contract obligations. Defendant Mears was merely confronted with a highly complicated and lengthy document in a location where he could not possibly analyze same; he made a very logical arrangement that it was not to be a contract until he received back an executed copy so he

could understand same. He did so with knowledge that one could at any time, and with or without reason, cancel these contracts by methods spelled out therein. In other words he took an honorable approach to an honorable set of circumstances which should not be confused with the nefarious approaches appearing in many of these cases. He dealt exactly the way any honest man would deal with any contractual situation, and should not be measured by those who make "Sham" arrangements for their own benefit.

A substantial portion of Plaintiff's petition is devoted to factual allegations and legal applications not at all in keeping with the facts of the case. Full answer is neither necessary nor warranted in view of the finding of the jury and holding of the Courts as to the actual facts of the case. It is felt, however, that in Petitioner's attempt to "generalize the specific" certain factual inaccuracies have appeared. It is, therefore felt that such factual inaccuracies as Mears' admission to an "executed agreement, existence of "secret agreements", "clandestine arrangements", that he "pocketed royalty moneys", avoided "his written obligation", "reneged" on obligations and the like, should be called to this Court's attention with reference only to the finding of the jury and opinions of the Trial Court and Third Circuit as to their accuracy.

A summation of Petitioner's authorities places them in one of two categories:

1. Cases where parties sought to avoid fully executed and existing contracts by collateral oral agreements varying the terms of the writing.

2. Dissenting opinions representing minority holdings.

It is respectfully submitted that neither presents that type of question in which this Court grants certiorari. It

should be specifically noted that the holding of the Third Circuit in the case at bar is not in conflict with any other circuit or holding.

Conclusion

Defendant earnestly contends that the ruling of the Third Circuit in the instant case is not in conflict with any decision of any other Circuit nor of this Court.

Dissenting opinions do not create such conflict.

The issue raised and determined by the Trial Court (opinion of which is attached hereto in excerpt form) and affirmed by the Third Circuit is not in conflict or at variance with the Act of Congress (Sec. 302 (c) and Sec. 8 (d)). Each section of said Act *by its very terms* requires "execution of a written contract" (Sec. 8 (d)) or that the terms be "specified in a written agreement" (Sec. 302 (c)) which was not done in the case at bar, though specifically requested by Defendant. It is clear that the Labor Management Relations Act requires a completed contract in writing and that no such contract existed in the instant case.

Petitioners also in their Petition seek to bring in a reference to some thirty-eight cases pending in other Courts. Said cases are foreign to the record of this case and in no way a part thereof. If duly executed contracts existed in these cases, the question heard and determined in the case at bar cannot arise. Likewise, if any of said cases are "sham" cases, where a contract was completed but a private agreement varying its terms is made by employer and organizer, the question determined in the instant case cannot arise.

It cannot be regarded as the prerogative of the Courts to make a writing or to complete the making of the writing of a contract between the parties.

For the foregoing reasons, Counsel for Defendant respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. LEE MILLER,
MILLER & MILLER,
Pittsburgh, Pa.

Appendix.

Excerpts from Opinion of Trial Court.

Marsh, District Judge.

* * *

The case was submitted to the jury on two interrogatories pursuant to Rule 49(a), Fed. R. Civ. P., 28 U.S.C.A. These interrogatories were submitted to counsel prior to their closing address to the jury,[1] and neither counsel made any objection thereto nor did either counsel demand that any other issue of fact be submitted to the jury.

The questions submitted to the jury were:

> "1. Did Arthur Anderson agree with the defendant Mears that the written instruments, Exhibits 1, 2 and 3, at the time they were signed by Mears, would not become valid and enforceable contracts until Mears received copies thereof executed by the officers of the United Mine Workers of America?"

to which the jury answer "Yes", and

* * * *

The verdict was rendered on May 4, 1960.

Argument was had on plaintiffs' second motion for a directed verdict on June 21, 1960,[2] and on the following day an order was filed denying the motion and entering judgment in favor of the defendant in accordance with the jury's answers to the interrogatories.

On June 30, 1960, plaintiffs filed the motions here under consideration, *viz.*, a "Motion to Reopen Judgment and For a Directed Verdict in Favor of the Plaintiffs" and a "Motion for New Trial".

---

[1] Testimony, p. 179.

[2] This procedure was in accord with plaintiffs' preference and contrary to defendant's preference (T. pp. 238-240).

Motion for New Trial.[3]

Plaintiffs cite fourteen points in support of this motion: in their briefs and at oral argument, however, they stress only three which may properly be considered under a motion for new trial. These points may be summarized as follows:

1. The court erred in permitting evidence that the proposed agreement was not to become a contract until defendant received a copy of it signed by the United Mine Workers of America. Plaintiffs contended that this evidence was in violation of the parol evidence rule.

2. The court erred in not finding as a matter of law that the defendant was estopped to disavow the agreement.

3. The court erred in not finding as a matter of law that the defendant ratified the agreement.

The parol evidence rule has no application to the facts of this case. Here, the defendant admitted that he signed the contract document, *but contended that it never ripened into a contract* because Anderson, who procured defendant's signature, had agreed that the instrument would not be a contract until defendant had received a copy, signed and completely executed. This, defendant contended, was a condition precedent to the formation of the contract, and since the condition never occurred, there was no contract.

The parol evidence rule provides generally that whenever any *contract* is contained in writing which appears to be complete and regular on its face, it is the sole evidence of the agreement, and cannot be *varied, altered,* or *contradicted* by parol (except in certain circumstances not present in this case). See: *Bardwell v. Willis Co.*, 375 Pa. 503,

[3] The motion for a new trial was served within 10 days after the entry of judgment in accordance with Rule 59(b), 28 U. S. C. A.

100 A. 2d 102 (Supreme Ct. of Pa. 1953) and cases cited on page 104 (A. 2d).

It is, of course, fundamental that with respect to the application of the rule to contracts, there must first be a contract. In *Similon v. Dickerson*, 357 Pa. 455, 54 A. 2d 883 (Supreme Ct. of Pa. 1947), the Court at page 886 (A. 2d) quotes from *Burke v. Dulaney*, 153 U. S. 228, as follows:

> "'The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract * * *.'"

Further, the Court states:

> "In the leading English case of Pym v. Campbell * * * it is said: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.'"

Wigmore on Evidence, 3d Ed., Vol. IX, § 2410, pp. 30-33, states with reference to the parol evidence rule:

> "The case of Pym v. Campbell, in England, is commonly taken as the leading one.
>
> "In the United States, the doctrine is not only completely accepted, but has even been applied to sealed instruments other than deeds of land in jurisdictions still bound by precedent to the older rule for deeds * * *."

In Williston on Contracts, Revised Ed., Vol. 3, § 634, at pp. 1823-1825, it is stated:

> "Accordingly, it may be shown by parol evidence not only that a writing was never executed or delivered as a contract * * * but also * * * that the parties agreed by parol that the writing in question should not become effective until some future day or the happening of some contingency, if this is not inconsistent with the express terms of the writing."

The Restatement of the Law of Contracts, Chapter 9, 241 states:

> "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Plaintiffs cite *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, for the proposition that § 301(b) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185(b) gives the federal courts the power to fashion a body of federal law in the light of the national labor policy for the enforcement of collective bargaining agreements; plaintiffs then cite the following cases as authority for the rule that parties to a collective bargaining agreement are precluded from relying on prior or contemporaneous oral agreements: *Lewis v. Toth*, Civil Action 14875 (W. D. Pa. 1959), *affirmed* ____ F. 2d ____ (3rd Cir., July 28, 1960); *Lewis v. Mearns*, 168 F. Supp. 134 (N. D. W. Va. 1958), *affirmed* 268 F. 2d 427 (4th Cir. 1959); *Gatliff Coal Co. v. Cox*, 152 F. 2d 52 (6th Cir. 1945); *Lewis v. Young and Perkins Coal Company, Inc.*, Civil Action 806 (W. D. Ky. 1960). It is clear, however, that in each of the cases cited, the Court was applying the parol evidence rule to collective bargaining contracts in its generally accepted manner; namely, to preclude an attempt to *alter, vary* or *contradict* the terms of a *contract*. It appears, therefore, that the federal courts in fashioning "a body of federal law in the light of the national labor policy" have simply adopted and applied the common law parol evidence rule, and that rule, as previously demonstrated has no application to the facts in this case. There was no attempt to alter, vary, or contradict any term of the alleged contract in the instant suit;

the defendant was simply permitted to show that no contract existed, which as we have seen, was not in violation of the parol evidence rule.

It follows, then, that the court was not in error in permitting the defendant to prove the agreed condition precedent to the formation of the contract in suit.

Prior to the court's charge to the jury, plaintiffs submitted, *inter alia*, the following points for charge:

> "13. The defendant's actions in making payments to the Welfare Fund, checking off union dues, accepting benefits for himself and his employees, ratified the agreement of 1950, as amended, and he is bound by the terms thereof.
>
> "14. Defendant, in signing the agreements, failing to disavow them and in committing acts consistent therewith, estopped himself from maintaining that the contracts never legally existed."

We denied both of the points, and in their motion for a new trial plaintiffs cite as error the court's refusal to find as a matter of law that defendant was estopped to disavow the written collective bargaining agreement and that defendant ratified said agreement.

There was no error in refusing points 13 and 14. As previously stated, the case was submitted to the jury on special interrogatories pursuant to Rule 49(a), Fed. R. Civ. P., 28 U.S.C.A. Plaintiffs' points 13 and 14 were not demands under Rule 49(a) for the submission of those questions to the jury; on the contrary, they were requests that the court resolve them as a matter of law in favor of the plaintiffs, and neither the law nor the evidence warranted such a ruling by the court.

The plaintiffs, of course, had the burden of proof on both of the points cited, and had we granted the points, or

either of them, we would have, in effect, directed a verdict in favor of the plaintiffs on the liability question—the only real issue in the case. As stated in *Polhemus v. Water Island*, 252 F. 2d 924, 928 (3d Cir. 1958):

> "It is not a usual thing for the trial judge to direct a verdict in favor of the party having the burden of proof, though this has sometimes been done, *under extreme circumstances.*" (Emphasis supplied.)

In Moore's Federal Practice, Vol. 5, ¶ 50.02[1], p. 2314, it is stated:

> "[A]lthough the statements concerning directed verdicts are often extremely ambiguous, a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported *by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion.*" (Emphasis supplied.)

See also, cases cited in footnote 8, page 2314, and in annotations.

The evidence pertinent to the questions of estoppel and ratification fell far short of pointing "so strongly in favor of one party [*i.e.*, plaintiffs] * * * that the court * * * [felt] reasonable men could not possibly come to a contrary conclusion" on those questions.

There was evidence that defendant accepted Fund hospitalization benefits from which the plaintiffs contend defendant thereby either ratified the alleged contract or was estopped to deny its existence, but there was also evidence that defendant was a member of the Union and the holder of a valid hospital benefits' card for two years prior to the date on which he signed the alleged contract (T., pp. 98, 99).

In 19 Am. Jur., Estoppel, § 65, it is stated at pp. 691-692:

> "[E]stoppel does not ordinarily arise from the acceptance of benefits * * * where the acceptance is not inconsistent with the position subsequently taken. One cannot be estopped by reason of accepting that which he is legally entitled to receive in any event. Hence, estoppel against attacking or disputing a contract or transaction is not ordinarily created by the acceptance of a benefit purporting to be derived therefrom if in fact the party is entitled thereto regardless of whether the contract or transaction is sustained or overthrown."

See also, 31 C. J. S., Estoppel, § 109, page 350.

There was evidence that the defendant paid royalties in accordance with the contract—and plaintiffs offer this as proof that defendant either ratified the contract or should be estopped to deny it—but there was also evidence that defendant paid some of these royalties prior to the execution of the contract here in suit (T., p. 56) and that the reason defendant paid royalties, regardless of contractual liability, was because his customers would not purchase defendant's coal unless the royalties were paid (T., p. 70). The so-called "check letters of advice" sent to the Fund have no more effect than the royalty payments since the former were simply forms which accompanied the payments.

* * *

All of the above, we think, creates sufficient doubt on the questions of estoppel and ratification to preclude binding instructions or any ruling in favor of the plaintiffs as a matter of law. These questions could have been submitted to the jury if either party had so requested, but since neither party demanded that those issues be submitted to the jury, when the court entered judgment on the special verdict the court is deemed to have made findings "in accord with the judgment on the special verdict." Rule 49(a).

* * *

Office Supreme Court, U.S.
FILED
MAY 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 837

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of The United Mine Workers of America Welfare and Retirement Fund, *Petitioners*,

v.

EDWARD MEARS, Individually and Trading as Mears Coal Company.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

VAL J. MITCH,
HAROLD H. BACON,
CHARLES L. WIDMAN,
907 Fifteenth Street, N. W.
Washington, D. C.

A. E. KOUNTZ,
ALEXANDER UNKOVIC,
WILLIAM G. BOYEL,
KOUNTZ, FRY & MEYER,
1124 Frick Building,
Pittsburgh 19, Pennsylvania

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 837

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of The United Mine Workers of America Welfare and Retirement Fund, *Petitioners*,

v.

EDWARD MEARS, Individually and Trading as Mears Coal Company.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Though Mears' brief opposing certiorari challenges Trustees' assertion he admittedly signed the collective bargaining agreement requiring Mears to pay the per

ton royalty and seeks to impress this Court that Mears signed only "a blank, undated form". (Br. 9). It suffices, to show the fallacy of Mears' statement, that the trial court's jury charge included, without Mears' objection, that (J.A. 110a)

> "The written instruments . . . introduced . . . as Exhibits 1, 2 and 3 . . . have all been signed by John L. Lewis, President, and other officers of the Union, *and by Edward Mears.*"

Whether Mears executed the agreement was never an issue; Mears conceded he had (Stipulation, J.A. 35-6a, 37a, 38a, 47a) and the trial court regarded the signatures of those signing for the Union as genuine (J.A. 37a).

Further challenge to Mears' repetitive description of the agreement as a mere "blank" (Br. 9, 10, 14, 17) and his claimed inability to make "a fair analysis of this involved document" (Br. 10) is found in Mears' own testimony that "*we had discussed most anything that was necessary to know about them then*" (J.A. 48a). Also whether UMW would sign the agreement was never an issue and Mears does not contend it was. Indeed, since the agreement which Mears signed was the industry-wide agreement negotiated by UMW and prevailed in the bituminous coal industry, it is a frivolous argument for Mears to contend (Br. 16) that UMW could have amended it or refused it when, as a matter of fact, it did neither.

While the jury answer was favorable to Mears that the agreement "*signed by Mears*" would not become enforceable until Mears received a copy, the crux of Trustees' position is that national labor policy precluded the admissibility of Mears' testimony to that effect.

Mears contends (Br. 11) that the *Benedict*, *Gatliff*, *Heinz*, *Toth* and *Mearns* cases[2] all cited in Trustees' certiorari petition (pp. 11-12, 16-22), and *Lewis v. Cable*, 190 W.D. Pa., 1962, 167 F. Supp. 296, are distinguishable because each involved an admittedly executed agreement. The obvious lack of merit in Mears' position is seen, first, in the fact that *here, there is an agreement fully executed by Mears as a signatory operator-employer and by UMW as the collective bargaining representative.* Furthermore, Mears does not argue he was opposed to paying the royalty to the Fund or to any other provision therein. Since Mears admits J.A. 18) he and the union representative "had discussed almost anything that was necessary to know about" the terms and conditions under which Mears' employees were to work, it follows that Mears consented to such terms and conditions which were to govern the employment of those who produced his coal and *he became legally bound to pay the per-ton royalty as a term agreed upon, even if there had not been a written agreement.* In the absence of objection to any of the terms and conditions of employment, the reduction of those terms and conditions to a written document was merely a fulfillment of the requirement of the Act's Section 8(d). Even prior to Heinz' mandate that agreements reached be reduced to writing "as a permanent memorial" (311 U.S. 514, 523) and the enactment of Section 8(d), Circuit Judge L. Hand impressively avowed the practical need for preserving in writing the results of collective bargaining because, as he noted, "without it the fruits" thereof "are exposed to the sport of

[2] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459; *Gatliff Coal Co. v. Cox*, 6 Cir., 142 F. 2d 32; *H. J. Heinz Co. v. NLRB*, 311 U.S. 514; *Lewis v. Toth*, 3 Cir., 280 F. 2d 422; *Mearns v. Lewis*, 4 Cir., 268 F. 2d 427, 428.

fugitive and biased recollection". *Art Metal Const. Co.* v. *NLRB*, 2 Cir., 110 F. 2d 148, 150. In the case just cited Circuit Judge Hand further observed (p. 150):

> "It is indeed true, and for that matter a truism, that a stipulation in an oral contract that it shall be put into writing is one of its terms; and that if an employer must put it in, he is not free pro ta. to."

Hence, in light of Section 8(d)'s command, having agreed to the terms of employment, Mears had a statutory duty to reduce them to writing; he was "not free" to the extent which Section 8(d) required, and not having included in the written agreement the alleged oral condition he is precluded from reliance thereon.

This statutory demand of a "written memorial" emphasizes the absolute necessity of embodying in writing the whole agreement reached and rejecting as inadmissible any alleged prior or contemporaneous understanding not contained in the written memorial. Congress could not have contemplated otherwise. If national labor policy as expressed in Section 8(d) rejects (as *Toth*, *Gatliff* and *Mearns* hold, the validity of which Mears concedes) a prior or contemporaneous agreement to void an operator's written obligation to pay royalty in a specified amount to the Fund, it must necessarily render inadmissible Mears' testimony herein that he had a contemporaneous understanding with the union representative that the collective bargaining agreement was not to be effective until he received an executed copy thereof. In either of the situations noted the understanding is a prior or contemporaneous one. *Art Metal* stresses (110 F. 2d 150) that "it is

the merest casuistry to argue that the promisor's freedom to contract includes the opportunity to put in jeopardy the ascertainment of what [the employer] has agreed to do, or indeed whether he has agreed to anything at all. The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them; it is not the freedom, once they have in fact agreed upon those conditions, to compromise the value of the whole proceeding, and probably make it nugatory."

Mears' attempt to limit Benedict's holding that collective bargaining agreements must be granted a more secure and stable position in our National economy than that of ordinary common law contracts so that Benedict "applies only to this third party beneficiary status of a welfare fund" (Br. 11) is answered in the recent case of *Lewis* v. *Mill Ridge Coals, Inc.*, 6 Cir., 298 F. 2d 552, 557, wherein it is said of *Benedict*,

> "The Supreme Court has now placed collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts."

Mears relies heavily upon *NLRB* v. *Nash-Finch Co.*, 8 Cir., 211 F. 2d 622, but Trustees submit that, contrary to Mears' assertion, *Nash-Finch* supports their position. Here again, Mears would distinguish the instant case from *Nash-Finch* on the ground that there was therein "a valid completed contract" (Br. 15). Mears would leave this Court under the impression that the union in *Nash-Finch* regarded its signature to the contract as a prerequisite to a binding contract. What Mears fails to emphasize is that following *incompleted* negotiations on terms of a bargaining agree-

ment *and prior to the company's signing the agreement*, the union submitted a proposed draft to the company which was *not signed by either party*. Thereafter, the company signed and submitted an amended proposal which the union signed. Upon union contention its members were entitled to benefits not covered by the amended, executed contract, the Eighth Circuit declared that where contracting parties voluntarily place their engagement in writing in such terms as import a legal obligation, "*it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing*" (211 F. 2d 626). Implementation of the Eighth Circuit's rule would interdict the use of Mears' alleged agreement to avoid his contractual obligation.

The certiorari petition (pp. 2, 11) reveals the Third Circuit's Judges, acting en banc, divided equally upon the question of granting or denying certiorari. Mears' invitation that this Court disregard (Br. 16-17) the views of the four jurists who believed the instant case to be at odds with national labor policy, as expressed in Chief Judge Biggs' dissent, is to request this Court to ignore its approval in *U.S. v. American Foreign S. S. Corp.*, 363 U.S. 685, 689-90, of the statement:

> "The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions . . ."

The confused and uncertain state of the rule in the Third Circuit, shown in the certiorari petition, indicates the necessity of the issuance of the writ.

CONCLUSION

For the reasons discussed herein and in the certiorari petition, the writ prayed for therein should issue.

Respectfully submitted,

VAL J. MITCH
HAROLD H. BACON
CHARLES L. WIDMAN
907 Fifteenth Street, N.W.
Washington, D. C.

A. E. KOUNTZ
ALEXANDER UNKOVIC
WILLIAM G. BOYLE
KOUNTZ, FRY & MEYER
1424 Frick Building
Pittsburgh 19, Penn.

M. E. BOIARSKY
511 Kanawha Valley
Building
Charleston, West Virginia

Attorneys for Petitioners

May 9, 1962